Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec

Volume 1
International Dimensions

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Royal Commission on Aboriginal Peoples

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and
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Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec

International Dimensions

S. James Anaya,
Richard Falk
and
Donat Pharand

Introduction

The work of this research project was divided between an analysis of fiduciary obligations to Aboriginal peoples under Canadian law and an analysis of them under international law. The conclusions reached by these inquiries, although relying on distinct sources and somewhat different patterns of legal justifications, reach an overarching mutually reinforcing conclusion: the government of Canada has a fiduciary obligation to the Aboriginal peoples of Quebec during all phases of any process by which Quebec may accede to sovereignty as a state distinct from Canada.

The nature of the fiduciary obligations, acknowledged as such, has become clearer in Canadian law during the last 20 years as a result of two landmark Supreme Court cases, *Guerin* v. *The Queen* (1984) and *R.* v. *Sparrow* (1990), as explained by Renée Dupuis and Kent McNeil in the other volume of the study (see *Volume 2–Domestic Dimensions*). From these cases the authors affirm that the existence of a fiduciary obligation to Aboriginal peoples in Canada has deep historical roots that include the Treaty of Utrecht (1713), the Capitulation of Montreal (1760), the *Royal Proclamation of 1763*, and section 91(24) of the

Constitution Act, 1867, as well as various more specific arrangements governing particular land claims. This line of authority in Canadian law, explored extensively by Dupuis and McNeil, establishes a fiduciary obligation that requires the government of Canada to protect the rights and well-being of Aboriginal peoples. This general right, which applies to each Aboriginal people in Canada, is supplemented to varying degrees by specific arrangements that may give a clearer delineation of the character of the obligation for the benefit of a given Aboriginal people.

Turning to international law, the subject of the papers in this volume, several preliminary observations seem in order. First, there are several important matters of terminology. As might be expected, the conceptions relied upon in international law are semantically different from those used in Canadian law, although the general intention often appears to be the same. Thus, 'fiduciary obligation' is not a term of art in international law; instead, 'trust relations' and related concepts are relied upon to address the duties owed by states to various categories of protected peoples, including the peoples referred to in the Commission's mandate as Aboriginal peoples. Indeed, 'Aboriginal peoples' is not a term in use in international law; rather, the terms 'Indigenous peoples' or 'Indigenous populations' are used. In this study the Canadian usage is preferred for the most part, but it embraces developments pertaining to other equivalent identifications.

Second, there is the matter of sources. Unlike domestic law, international law does not often express its doctrinal conclusions in the form of authoritative judicial decisions or legislative acts, much less characteristically embody rights and duties in constitutional instruments, as is often the case in national legal systems – for example, Canada's enactment of the *Constitution Act, 1982*, which rests the rights of Aboriginal peoples in section 35. International law is generally

embodied either in agreements, which are adhered to formally by states in accordance with their constitutional procedures, or in practice, which is shaped by a sense of obligation and thereby acquires over time the status of customary international law.

In the domain of human rights, customary norms that come to embody rights and duties of an enforceable character often derive initially from non-obligatory instruments such as 'declarations' by governments or resolutions of the United Nations General Assembly and other organs of international institutions. Two of the most celebrated examples of this process are the Universal Declaration of Human Rights (1948) and the Declaration of Principles of International Law Concerning Friendly Relations Among States (1970). In the evolving area of international law upholding the rights of Aboriginal peoples, the instruments that have emerged have a somewhat ambiguous status; they include an unratified convention of the International Labour Organisation, a Draft Declaration of the Rights of Indigenous Peoples that has not yet proceeded through all stages of adoption, even within the United Nations system, and resolutions adopted by respected international institutions, and they extend to scholarly writings by respected international law experts.

Third, following the practice of England, Canada automatically incorporates customary rules of international law into Canadian law, with some caveats about consistency with Canada's sovereign status. Such customary rules will be applied directly by Canadian courts and other government officials unless they conflict with statute or fundamental constitutional principle, in which case enabling legislation would be required. In this regard, in the absence of conflicts with pre-existing Canadian law, customary rules of international law are immediately available without awaiting any further formal action.[1]

Fourth, despite this uncertainty about the current bearing of emergent international law on several of the specific matters of concern to this Commission, the general direction and orientation of international law are clear and authoritative, paralleling the evolution of Canadian law with respect to the treatment of Aboriginal peoples. This direction is one of moving from a protective, assimilationist attitude toward Aboriginal peoples to one of respecting inherent individual and group rights, including some form of sovereignty and some valid claim of a right of self-determination that extends, at least, to encompass a right of self-government. Such a trend, described later in this volume in the paper by James Anaya, is common ground among international law experts and joins the authors of this study with those responsible for the Pellet Report (prepared by five distinguished international specialists at the behest of the Quebec National Assembly), which is criticized in other respects in the paper by Richard Falk later in this book.

Fifth, international law imparts some general legal duties on the government of Canada, but it also leaves considerable room for the exercise of discretion. The impact of an accession to sovereignty of the sort being discussed in Quebec has no clear, relevant precedents. What does seem clear is the need for respect for participatory rights and the assurance that the emergent circumstances are fully protective of Aboriginal rights, including the right of self-determination. In this regard, however the situation is handled, the government of Canada will create a legal precedent. As such, the government is confronted by the challenge and opportunity to produce an influential, just, and socially and politically constructive precedent.

For several centuries, dating back to its modern origins in the sixteenth century in the writings of Vitoria, international law has acknowledged an obligation of a trust character toward Indigenous peoples. Of course, the conquest and domination that occurred in North

America were premised on relations of disparity, not mutuality. As James Anaya's paper shows, the nature of the rights enjoyed in international law by Indigenous peoples changed in this century as the ethos of self-determination made its slow transition from morality to politics to law, providing both the legal foundation of the process of decolonization and the most fundamental norm of the international law of human rights, embodied as a common article 1 in the two human rights covenants, both of which were ratified by Canada in 1976.

James Anaya's paper also documents the emergence of a movement that focused on the legal rights of Aboriginal peoples. In this sense, he traces its history from the liberal assimilation approach, taken without any participation by Indigenous representatives, which took the form of Convention No. 107 (1957) of the International Labour Organisation, to the much more representative ILO Convention No. 169 (1989), which resulted from pressures generated by Indigenous peoples active at the international level, especially by way of the Working Group on Indigenous Populations created by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Human Rights Commission.

Convention No. 169 affirms the equality and integrity of Indigenous peoples and their cultures, and it confers broad rights of autonomy that amount to a right of self-government. The convention is careful, however, not to articulate a right of self-determination, even saying explicitly in article 1.3 that the use of 'peoples' in the text does not imply other rights under international law. Canada has not ratified No. 169, yet it was active in the negotiating process that produced the document and has been at the forefront of countries taking seriously the claims put forward by and on behalf of Aboriginal peoples. The concerns of the government of Canada with respect to this convention are analyzed in ANNEX III of this volume.

Convention No. 169 appears to be at least partly declaratory of existing or emergent customary international law, as affirmed by numerous other developments. At the cutting edge of emergent customary international law, the government is left in a position to exercise discretion. In agreement with the Pellet Report, our analysis would encourage a broad acknowledgement of the rapid development of international law on these matters, such that the self-government and other rights affirmed in No. 169 are fully accepted as legally binding.

The Falk paper considers the status of Aboriginal claims to a right of self-determination equivalent to the status accorded the province of Quebec, acknowledging both the trend toward acknowledgement in international law and practice and the unsettled character of such claims, in terms of both status and scope. In the present unresolved situation, international law does not point clearly to a solution one way or the other, leaving the government of Canada with the general duty to protect affected Aboriginal peoples but not specifying how this duty should be fulfilled, or whether it entails participation and consent on the part of affected Aboriginal peoples or merely some form of consultation and a demonstration of good faith. The approach taken by the government of Canada will be influential in settling international law for the future. As is made clear in the Falk study, the acknowledgement of a legal right of self-determination available to Aboriginal peoples is exceedingly unlikely, under contemporary circumstances, to generate political claims that exceed currently vested rights of self-government, but the denial of such a right of self-determination, or even its qualified conferral in these limited terms, is likely to produce angry responses from Aboriginal communities and their representatives.

The Falk paper also considers the relevance of recent international practice with respect to self-determination, especially the emergence of a series of new states in the wake of the collapse of the

Soviet Union and the disintegration of Yugoslavia. The conclusion reached, at variance with the Pellet Report, is that such state-shattering moves of secession have legal, as well as factual, significance and undermine the clarity of prior legal limitations on the exercise of the right of self-determination, which either intended to confine its role to settings of decolonization or accepted the prohibition on territorial dismemberment, meaning that no new and additional sovereign entities could result from claims of self-determination. The legal weight of this recent practice is confirmed by the dynamics of diplomatic recognition accorded these new claimants and their admission to the United Nations and other international bodies. The legal relevance of this practice to the controversy surrounding Quebec is less evident, but it does suggest an enlarged scope for the right of self-determination; as a result, Aboriginal claims of self-determination are entitled to a more sympathetic hearing, despite their apparent inconsistency with the pre-1989 general understanding that the right of self-determination was limited to instances of formal colonial rule.

As the paper by Donat Pharand makes evident, the emergence of Quebec as a separate state would raise a series of complex issues in international law. Canada, and other states, would be entitled to withhold diplomatic recognition until Quebec had acted to fulfil its legal obligations, including those assumed in relation to Aboriginal peoples. Similar considerations pertain, as Pharand explains, with respect to the admission of an independent Quebec to the United Nations and other international organizations. Further, many issues are posed by the extent to which, under international law, Quebec would succeed to rights and duties currently applicable at the federal level (see ANNEX I), as well as by the bearing of general principles of law upon the interpretation of legal rights and duties in the context of Quebec's possible separation from Canada (ANNEX II). All three annexes address topics of

significance to this study but do so in a more limited fashion than the main text.

Part I
Canada's Fiduciary Obligation Toward Indigenous Peoples in Quebec under International Law in General

by S. James Anaya

Introduction

International law imposes a special obligation on Canada with respect to the Aboriginal peoples living in the country. A common thread in the historical jurisprudence and patterns of behaviour associated with the development of international law is the doctrine embracing a special duty of care toward Indigenous or Aboriginal peoples. In its broadest sense, the doctrine includes a general duty upon the international community at large and more particularized state obligations to ensure the well-being of Indigenous peoples and the full enjoyment of their rights. This doctrine, which appears also in domestic or municipal law, has been associated with the terms 'trusteeship', 'wardship' or 'fiduciary obligation', although its development in the law only roughly approximates the legal regimes ordinarily attached to those terms. The special duty doctrine is *sui generis*, arising from a nucleus of jurisprudential and practical considerations unique to the conditions of Indigenous peoples. This part of the study identifies the general contours of Canada's special obligation toward Aboriginal peoples under international law, first identifying historical antecedents and then discussing relevant aspects of contemporary international law.

The Historical Context

A special duty to ensure the just treatment of Indigenous peoples has been a doctrine in western legal thought since the early history of

European contact with Indigenous peoples in the western hemisphere and elsewhere. The normative elements of the doctrine and their implications have changed, however, as dominant thinking about the substantive content of Indigenous peoples' rights and well-being has shifted over time. The following historical sketch emphasizes that the special duty doctrine is both long-standing and evolutionary.

Before the middle part of this century, three discrete strains of thinking fed into the notion that states owe special duties or trusteeship obligations to the Indigenous populations falling under their authority or control. For simplicity, we refer to them here as the consent/protectorate strain, the white man's burden strain, and the liberal assimilation strain.

The Consent/Protectorate Strain

Under the consent/protectorate strain, a state owes a duty of protection to an Indigenous people on the basis of mutual consent. Both the existence and the terms of the duty, or trusteeship, arise from agreement between otherwise independent sovereigns. This strain of trusteeship doctrine arose in association with the theory of international relations espoused by Emerich de Vattel, the eighteenth-century Swiss publicist generally regarded as among the most influential early theorists of international law. In his major work, *The Law of Nations or Principles of Natural Law* (1758), Vattel envisioned an international system comprising presumptively independent, mutually exclusive nations or states (terms he used interchangeably). Within this state-centred model, he discussed the practice whereby weaker nations or states voluntarily placed themselves under the protection of stronger ones. Vattel held that such states retained their sovereign status and powers of self-government over matters not voluntarily given up to the stronger power.[2]

Protectorate relationships of this kind existed between numerous North American Indian tribes or nations and European powers or their progeny pursuant to treaties consummated before this century. This pattern of consensual protectorates was the backdrop for early decisions of United States Supreme Court considering the status of the Indian tribes living within the exterior boundaries of that country. In the now famous case of *Cherokee Nation* v. *Georgia*, Chief Justice John Marshall, writing for the court, characterized the tribes as having "acknowledge[d] themselves, in their treaties, to be under the protection of the United States...". Marshall described the tribes as "domestic dependent nations.... Their relationship to the United States resembles that of a ward to his guardian."[3] In a later Supreme Court decision, *Worcester* v. *Georgia* (also involving the Cherokee), Marshall again wrote for the court and clarified his characterization of the tribes. Citing Vattel, Marshall emphasized the common use of the term 'nations' to refer to the tribes and drew an analogy with the "'[t]ributary and feudatory states'" of Europe,[4] which Vattel ranked among sovereign states subject to the law of nations despite their having assented to the protection of a stronger power.[5]

The White Man's Burden Strain

The consent/protectorate strain of trusteeship, reflected in historical treaties and upheld by judicial doctrine, waned as nineteenth-century states, including the United States and Canada, discontinued treaty making with non-European Aboriginal peoples and instead unilaterally asserted more and more power over them. This unilateral assertion of power eventually proceeded with the aid of a second and more influential strain of thought in the early evolution of the special duty or trust doctrine, a strain of thought associated with the British colonial phrase, 'the white man's burden'.

Under this strain of thought, which had intellectual underpinnings in the now infamous school identified as scientific racism, trusteeship existed over Indigenous peoples irrespective of their consent and instead arose because of their 'backward' and 'uncivilized' character.[6] Because of their presumed inferior status, Indigenous peoples were deemed incapable of managing their own affairs adequately, and hence 'civilized' humanity had to place them under its tutelage and bring them the 'blessings of civilization'. Trusteeship was thus a source of unilateral state power over Indigenous peoples, and Indigenous peoples' rights were reduced to those consistent with the 'civilizing' mission.

An early version of this thinking is reflected in the work of Francisco de Vitoria, the sixteenth-century Spanish theologian and jurist who, like Vattel, is considered among the fathers of international law. In his lecture, "On the Indians Lately Discovered" (1532), Vitoria analyzed a series of arguments advanced to justify Spanish authority over already occupied lands of the western hemisphere. Vitoria concluded his analysis as follows:

> There is another title which can indeed not be asserted, but brought up for discussion, and some think it a lawful one. I dare not affirm it at all, nor do I entirely condemn it. It is this: Although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly they have no proper laws or magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessaries, of human life. It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit. I say there would be

> some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay, our sovereigns would be bound to take it, just as if the natives were infants. The same principle seems to apply here to them as to people of defective intelligence...[7]

The argument floated by Vitoria gained backing in western intellectual circles as European colonizing states consolidated power over non-European lands. Among the colonial powers of the nineteenth century, Great Britain was a leader in devising special administrative regimes over Indigenous peoples with the objective of re-engineering their cultural and social patterns in line with European conceptions of civilized behaviour. In 1837, a special committee of the British House of Commons concluded that such a policy was required by the "obligations of conscience to impart the blessings we enjoy," as well as by practical considerations:

> [W]e have abundant proof that it is greatly for our advantage to have dealings with civilized men rather than with barbarians. Savages are dangerous neighbors and unprofitable customers, and if they remain as degraded denizens of our colonies they become a burden upon the State.[8]

The British policy, and its premise of indigenous inferiority, is reflected in the following excerpt from a letter by Prime Minister Lord John Russell, written on 23 August 1840, to Sir George Gipps, the governor of New South Wales, Australia:

> Between the native, who is weakened by intoxicating liquors, and the European, who has all the strength of superior civilization and is free from its restraints, the unequal contest is generally of no long duration; the natives decline, diminish, and finally disappear...
>
> The best chance of preserving the unfortunate race...lies in the means employed for training their children. The education given to such children should consist in a very small part of reading and writing. Oral instruction in the fundamental truths of the Christian religion will be given by the missionaries themselves. The children should be taught early; the boys to dig

> and plough, and the trades of shoemakers, tailors, carpenters, and masons; the girls to sew and cook and wash linen, and keep clean the rooms and furniture.[9]

The views advanced by Great Britain and adopted by other colonizing powers were internationalized through a series of conferences and related efforts aimed at regulating continued European penetration into Africa. Most notable in this respect was the first Berlin Conference on Africa, which concluded in 1885 with the signing of a General Act intended to set the basic parameters for what has been dubbed the "scramble for Africa".[10] Under the article VI of the General Act, the signatory powers agreed to "bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being", with the ultimate purpose of "instructing the natives and bringing home to them the blessings of civilization."[11] In his 1926 work, *The Acquisition and Government of Backward Territory in International Law*, the British jurist M.F. Lindley argued that the trusteeship doctrine as advanced by the Berlin General Act had become widely accepted and should be understood as part of general international law.[12]

The Liberal Assimilation Strain

In the early part of this century, the white man's burden strain of thinking diminished with the rise of what can be called the liberal assimilation strain. Under this more modern strain of thought, trusteeship doctrine continued as a source of official power, but only a transient one. The object of trusteeship under this view was not to control or manage the affairs of Indigenous peoples indefinitely. Rather, its goal was to go beyond infusing members of Indigenous groups with western skills and values and, ultimately, to assimilate them into non-tribal societies constructed on the basis of individualistic precepts of

equality and democracy. Purged of pseudo-scientific notions of racial hierarchy, trusteeship over the tribal aborigine was to lead to, and be replaced by, his full and equal citizenship in a modern liberal state.

During the turmoil surrounding the First World War, U.S. President Woodrow Wilson promoted the liberal model of political organization as a basis for world order. In a major foreign policy address, Wilson said,

> No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed.... I speak of this, not because of any desire to exalt an abstract political principle which has always been held very dear by those who have sought to build up liberty in America, but for the same reason that I have spoken of the other conditions of peace which seem to me clearly indispensable...[13]

Wilson's comments were concerned primarily with the conflicts over competing territorial claims in Europe; however, they had clear implications for the forms of governance imposed and maintained through colonial patterns in other parts of the world, especially as theories of white racial superiority became discredited.

A certain merger of Wilsonian liberalism and notions of trusteeship was incorporated into the Covenant of the League of Nations in its system of mandates, which applied to territories taken from the European powers defeated in the First World War. The covenant declared the "well-being and development" of the people of the subject territories to be a "sacred trust of civilization".[14] Although manifesting elements of trusteeship doctrine common to the white man's burden strain of thought,[15] the provisions of the covenant establishing the mandates system reflect a policy of moving Indigenous populations away from conditions of classical dependency.[16]

The merger of liberalism into trusteeship notions was strengthened, and its impact enhanced, with the Charter of the United

Nations and the human rights frame of global organization it spawned at the close of the Second World War. The human rights frame included a heightened international concern about the segments of humanity that continued to experience colonization or its legacies. In particular, chapter XI of the charter established special duties for United Nations members that "have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government."[17] Under article 73 of chapter XI, such members commit themselves to "accept as a sacred trust the obligation to promote to the utmost...the well-being of the inhabitants of these territories."

Following adoption of the charter, the international community simultaneously promoted, on the one hand, independent statehood for overseas colonial territories with their colonial boundaries intact[18] and, on the other hand, assimilation and rights of full citizenship for members of Aboriginal groups living within the boundaries of independent states.[19] In both cases, little or no value was placed on indigenous patterns of association and political ordering originating before European colonization. Instead, within the operative normative frame, the model pursued was that of the culturally homogenous, non-racially discriminatory, fully self-governing state. Nation building entailed a corresponding policy of breaking down competing ethnic or cultural bonds - a policy even, or perhaps especially, engaged in by newly independent states.[20] Through assimilation and rights of full citizenship, members of indigenous or tribal enclaves would be brought to equality and self-government.

The major embodiment in international law of the liberal assimilation strain of thinking in the specific context of enclave indigenous groups is Convention No. 107 of the International Labour Organisation (ILO) of 1957.[21] While requiring states to take extraordinary measures to benefit members of indigenous groups, the

convention's operative premise is assimilation, and hence it treats such measures as transitory. The thrust of Convention No. 107 is to promote improved social and economic conditions for Indigenous populations generally, but within a perceptual scheme that does not seem to envisage a place in the long term for robust, politically significant, cultural and associational patterns of indigenous groups. Convention No. 107 is framed in terms of *members* of Indigenous populations and their rights as equals within the larger society.[22] Indigenous *peoples* or *groups* as such are made beneficiaries of rights or protections only secondarily, if at all. The convention does recognize indigenous customary laws and the right of collective land ownership. Such recognition is overshadowed, however, by a persistent call for national programs of integration and non-coercive assimilation that ultimately render themselves unnecessary.

The following provisions illustrate the tenor and thrust of the convention:

> *Article 2*
>
> 1. Governments shall have the primary responsibility for developing co-ordinated and systemic action for the protection of the populations concerned and their progressive integration into the life of their respective countries. ...
>
> 3. The primary objective of such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative. ...
>
> *Article 3*
>
> 1. So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.
>
> 2. Care shall be taken to ensure that such special measures of protection—

(a) are not used as a means of creating or prolonging a state of segregation, and
(b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.

The philosophy toward Indigenous peoples reflected in Convention No. 107 also manifested itself at the international level in mid-twentieth century programs promoted by the Inter-American Indian Institute, established in 1940. The Institute, now a specialized agency of the Organization of American States (OAS), has organized a series of periodic conferences and otherwise acted as an information and advisory resource for OAS member states. Like ILO Convention No. 107, the initial policy regime adopted by the Institute embraced programs aimed at enhancing the economic welfare of indigenous groups and promoting their integration into the larger social and political order.[23]

Contemporary International Law Concerning Indigenous Peoples

In the last several decades, there have been significant advances in the structure of world organization and shifts in attendant normative assumptions. The burgeoning of the United Nations and other international institutions, along with the contemporary human rights movement, have provided fertile ground for social forces that have further altered the character of international law where it concerns Indigenous peoples. A special duty or fiduciary obligation toward Indigenous peoples continues among precepts operative internationally. Unlike previous formulations, however, such precepts are grounded today in an unprecedented measure of respect for the dignity of Indigenous peoples and their cultures.

This section discusses developments, driven substantially by Indigenous peoples' own articulated demands, giving rise to a reformed body of international law concerning Indigenous peoples. This new and

emergent body of international law, along with human rights instruments of general applicability, indicates the contemporary parameters of Canada's obligations toward Indigenous peoples.

The Contemporary Indigenous Rights Movement

International law's contemporary treatment of Indigenous peoples has taken form over the last few decades as a result of activity that has involved, and been driven substantially by, Indigenous peoples themselves. Indigenous peoples have ceased to be mere objects of the discussion of their rights and have become real participants in an extensive multilateral dialogue facilitated and sanctioned by the United Nations and other international institutions.

During the 1960s, armed with a new generation of men and women educated in the ways of the societies that had encroached upon them, Indigenous peoples began drawing increased attention to their demands for continued survival as distinct communities with unique cultures, political institutions and entitlements to land.[24] Indigenous peoples articulated a vision of themselves different from that previously advanced and acted upon by dominant sectors.[25] In the 1970s Indigenous peoples extended their efforts internationally through a series of international conferences and direct appeals to international intergovernmental institutions.[26] These efforts coalesced into a veritable campaign, aided by concerned international non-governmental organizations and an increase of supportive scholarly and popular writings from moral and sociological, as well as juridical, perspectives.[27]

Heightened international concern about Indigenous peoples, generated through years of work, was signalled by the United Nations General Assembly's designation of 1993 as the International Year of the World's Indigenous People and by its subsequent declaration of an

International Decade on the same theme.[28] With this heightened concern has come a reformulated understanding of the contours of general human rights principles and their implications for Indigenous peoples. And grounded in this reformulated understanding is a new – though still developing – body of international law governing state behaviour toward Indigenous peoples.

ILO Convention No. 169 of 1989

The International Labour Organisation Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989, is contemporary international law's most concrete statement of Indigenous peoples' rights and corresponding state obligations.[29] Convention No. 169 is a revision of the earlier Convention No. 107, and it represents the marked departure in world community policy from the philosophy of integration or assimilation underlying the earlier convention.[30] Canada is not a party to Convention No. 169 (see ANNEX III). However, as discussed below, Convention No. 169 represents a core of expectations that are widely shared internationally and, accordingly, it reflects emergent customary international law generally binding upon the constituent units of the international community. Canada's internal processes, which thus far have tended against ratification of the convention, do not detract from this conclusion. Concerns raised by the federal Department of Labour and other domestic constituencies, while indicating controversy over certain aspects of the convention,[31] do not amount to material practice in contravention of the core normative elements reflected in the convention and generally accepted internationally.

The basic thrust of Convention No. 169 is indicated by its preamble, which emphasizes

> that in many parts of the world [Indigenous] peoples are unable to enjoy their fundamental human rights to the same degree as

> the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded... (sixth paragraph)

The preamble recognizes in addition

> the aspirations of [Indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live... (fifth paragraph)

Upon these premises, the convention places affirmative duties on states to advance indigenous cultural integrity;[32] uphold land and resource rights (part II); and secure non-discrimination in social welfare spheres;[33] and the convention generally enjoins states to respect Indigenous peoples' aspirations in all decisions affecting them.[34]

The convention avoids use of the terms 'trust' or 'trusteeship', just as Indigenous peoples themselves have in pressing their demands in the international arena. These terms apparently have become disfavoured because of their historical linkage with philosophies no longer acceptable. The concept of a special or extraordinary duty to secure the rights and well-being of Indigenous peoples is implied, however, by the convention's very existence and, further, by its requirements of affirmative program action. Within the normative frame reflected by the convention, this special duty arises not because of some presumed inferiority of indigenous groups, but because of their especially disadvantaged condition resulting from a long history of colonization and its legacies.[35]

Convention No. 169 has been faulted for not going far enough, because several of its provisions contain caveats or appear in the form of recommendations.[36] In addition, the convention includes language that qualifies the term 'peoples' used to refer to the subject groups. The qualifying language, together with an explanatory note, disassociates the term 'peoples' from its linkage in other international instruments with

the term 'self-determination'.[37] The International Covenant on Civil and Political Rights and other international instruments affirm that "[a]ll *peoples* have the right of self-determination."[38] The International Labour Organisation has taken the position that the qualifying language regarding the term "peoples...did not limit the meaning of the term, in any way whatsoever" but was simply a means of leaving a decision on the term's implications to procedures within the United Nations.[39] Nonetheless, the qualifying language in the convention reflects an aversion on the part of states to acknowledging expressly a right of self-determination for indigenous groups out of fear that it may effectively imply a right of secession.

At the same time, however, even the qualified use of the term 'peoples' implies a certain affirmation of indigenous group identity and corresponding attributes of community. Whatever the convention's limitations, moreover, its aggregate effect is to affirm the value of indigenous communities and cultures and to establish in states a special duty to secure basic rights and pursue policy objectives in that regard. As an ILO official closely associated with the development of Convention No. 169 has observed, the convention "contains few absolute rules but fixes goals, priorities and minimum rights", which are to be realized through affirmative program action on the part of states.[40]

Since the convention was adopted at the 1989 conference, Indigenous peoples' organizations and their representatives have increasingly taken a pragmatic view and expressed support for the convention's ratification. Indigenous peoples' organizations from Central and South American have been especially active in pressing for ratification. Other organizations that have expressed support for the convention include the Nordic Sami Council, the Inuit Circumpolar

Conference, the World Council of Indigenous Peoples, and the National Indian Youth Council.

New and Emergent Customary International Law

ILO Convention No. 169 is significant to the extent that it creates treaty obligations among ratifying states in line with current trends concerning Indigenous peoples. The convention is also meaningful as part of developments giving rise to and manifesting new customary international law with the same normative thrust. Customary law is generally binding upon the constituent units of the world community, regardless of any formal act assenting to it.

Largely as a result of Indigenous peoples' efforts over the last several years, concern for Indigenous peoples has assumed a prominent place on the international human rights agenda.[41] Since the 1970s, the demands of Indigenous peoples have been addressed continuously in one way or another within the United Nations, the Organization of American States, and other international venues of authoritative normative discourse.[42] The extended multilateral discussion promoted through the international system has involved states, non-governmental organizations, independent experts and Indigenous peoples themselves. It is now evident that states and other relevant actors have reached a certain new common ground about the minimum standards that should govern behaviour toward Indigenous peoples, and it is further evident that the standards are already in fact guiding behaviour. Under modern theory, such a controlling consensus, which follows from widely shared values of human dignity, constitutes customary international law.[43]

The new and emergent consensus of normative precepts concerning Indigenous peoples is reflected at least partly in Convention No. 169. The convention was approved by consensus by the conference committee that drafted it[44] and adopted by the full conference by an

overwhelming majority of the voting delegates, including the Canadian delegation. The vote was 328 in favour and 1 against, with 49 abstentions.[45] None of the government delegates voted against adoption of the text, although a number abstained.[46] Government delegates that abstained, however, expressed concern primarily about the wording of certain provisions or about perceived ambiguities in the text, while in many instances indicating support for the core precepts of the new convention.[47]

Since the convention was adopted in 1989, government comments directed at developing a universal indigenous rights declaration for adoption by the United Nations General Assembly have affirmed the basic precepts set forth in the convention, and indeed the comments indicate an emerging consensus that accords even more closely with Indigenous peoples' demands.[48] The 1993 Draft Declaration on the Rights of Indigenous Peoples, produced by the five independent experts who make up the United Nations Working Group on Indigenous Populations, stands as an authoritative statement of norms concerning Indigenous peoples on the basis of generally applicable human rights principles, and it also manifests a corresponding consensus on the subject among relevant actors.[49] The extensive deliberations leading to the draft declaration, in which Indigenous peoples themselves played a leading role, enhance the authoritativeness and legitimacy of the declaration.

The draft declaration goes beyond Convention No. 169, especially in its bold statements concerning indigenous self-determination, land and resource rights, and rights of political autonomy.[50] Although the draft declaration is phrased mostly in terms of rights, it incorporates the concept of a special duty on the part of states to engage in program action to implement the rights and safeguard their enjoyment. This is evident in article 37, among others:

> States shall take effective and appropriate measures, in consultation with the Indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that Indigenous peoples can avail themselves of such rights in practice.

Not *all* parties concerned are satisfied with *all* aspects of the draft declaration developed by the Working Group for consideration by its parent bodies. Some Indigenous peoples' representatives have criticized the draft for not going far enough, while governments typically have held that it goes too far. Nevertheless, a new generation of common ground of opinion is discernible among experts, Indigenous peoples and governments about Indigenous peoples' rights and attendant standards of government behaviour, and that widening common ground is reflected in some measure in the Working Group draft.

This common ground is reflected further in government and other authoritative statements made in the context of continuing parallel efforts within the Organization of American States to develop a declaration or convention on Indigenous peoples' rights. In 1989, the OAS General Assembly resolved to "request the Inter-American Commission on Human Rights (IACHR) to prepare a juridical instrument relative to the rights of Indigenous peoples."[51] Pursuant to this task, the IACHR has collected commentary from governments and Indigenous peoples throughout the Americas on the nature and content of the rights to be included in the proposed instrument.[52]

Also manifesting, as well as contributing to, a new generation of international consensus on Indigenous peoples' rights are resolutions and policy statements that have already been adopted by important international institutions and conferences. Much of the discussion within international institutions about Indigenous peoples has focused on the damaging impact of development projects that have taken place in areas

traditionally occupied by indigenous groups.[53] In 1991 the World Bank adopted a revised policy directive in view of the Bank's pervasive role in financing development projects in less developed countries, where many of the world's Indigenous people live.[54] Operational Directive 4.20 was adopted after a period of expert study that helped reshape attitudes within the Bank toward greater program action concerning Indigenous peoples affected by Bank-funded projects, action in line with contemporary trends in thinking about their rights.[55] The following provisions of Operational Directive 4.20 indicate its essential thrust:

> 6. The bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness. ...
>
> 8. The Bank's policy is that the strategy for addressing the issues pertaining to indigenous peoples must be based on the *informed participation* of indigenous peoples themselves. Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources. [emphasis added]

Additionally, Agenda 21 of the United Nations Conference on Environment and Development, a detailed environmental program and policy statement adopted by the conference, includes provisions on Indigenous people and their communities.[56] Chapter 26 of Agenda 21 reiterates precepts of Indigenous peoples' rights and seeks to incorporate them within the larger agenda of global environmentalism and sustainable development. Chapter 26 is phrased in non-mandatory terms; nonetheless, it carries forward normative precepts concerning Indigenous peoples and hence contributes to the crystallization of consensus on Indigenous peoples' rights. The normative core of chapter 26 is reflected in the following introductory provision of the chapter:

> 26.1 Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people...have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.

In this same vein is the 1994 resolution of the European Parliament on "Action Required Internationally to Provide Effective Protection for Indigenous Peoples".[57] By this resolution, the European Parliament, declares that, among other things,

> 2. ...indigenous peoples have the right to determine their own destiny by choosing their institutions, their political status and that of their territory; ...
>
> 4. Solemnly reaffirms that those belonging to indigenous peoples have...[the] right to a separate culture [which] must involve the right to use and disseminate their mother tongue and to have the tangible and intangible features of their culture protected and disseminated and to have their religious rights and their sacred land respected; ...
>
> 7. Declares that indigenous peoples have the right to the common ownership of their traditional land sufficient in terms of area and quality for the preservation and development of their particular way of life...
>
> 10. Calls in the strongest possible terms on states which in the past have signed treaties with indigenous peoples to honour their undertakings, which remain imprescriptible...

Emphasizing the more general underlying obligation of states and the international community at large to secure Indigenous peoples in the full enjoyment of their rights are the following:

- the 1973 resolution of the Inter-American Commission on Human Rights stating that "special protection for indigenous populations constitutes a sacred commitment of the states";
- the Helsinki Document 1992 - The Challenges of Change, adopted by the Conference on Security and Co-operation in Europe, which includes a provision "[n]oting that persons belonging to indigenous populations may have special problems in exercising their rights"; and
- articles 28-32 of the Vienna Declaration and Programme of Action adopted by the 1993 United Nations World Conference on Human Rights, which urge greater focus on Indigenous peoples' concerns within the United Nations system.[58]

Especially significant are government statements about relevant domestic policies and initiatives made before international bodies concerned with promoting Indigenous peoples' rights. The government practice of reporting on domestic policies and initiatives has been a regular feature of numerous United Nations-sponsored and other international forums at which the subject of Indigenous peoples has been addressed.[59]

Governments' written and oral statements reporting domestic initiatives to international bodies are doubly indicative of the existence of customary law. First, the accounts of governments provide evidence of behavioral trends by which the contours of governing standards can be confirmed and further discerned, notwithstanding the difficulties in agreeing on specific normative language to include in written texts. Second, because the reports are made to international audiences concerned with promoting Indigenous peoples' rights, they strongly

indicate subjectivities of obligation and expectation attendant upon the discernible standards.

Illustrative are the following statements to the 1993 World Conference on Human Rights in Vienna under the agenda item "Commemoration of the International Year of the World's Indigenous People".

> *Statement of Colombia on behalf of the Latin American and Caribbean Group:*
> In Latin America there exists a process of recognizing the role played by indigenous cultures in the definition of our identity, a process which takes the form of state measures, through constitutional and legislative means, to accord respect to indigenous cultures, the return of indigenous lands, indigenous administration of justice and participation in the definition of government affairs, especially as concerns their communities.
>
> Within the framework of the state unity, this process is characterized by the consecration in some constitutions of the multi-ethnic character of our societies...[60]

> *Statement on behalf of the delegations of Finland, Sweden and Norway:*
> In the Nordic countries, the Sami people and their culture have made most valuable contributions to our societies. Strengthening the Sami culture and identity is a common goal for the Nordic governments. Towards this end, elected bodies in the form of Sami Assemblies, have been established to secure Sami participation in the decision making process in questions affecting them. Cross border cooperation both between Sami organizations and between local governments in the region has also provided a fruitful basis for increasing awareness and development of Sami culture.[61]

> *Statement by the delegation of the Russian Federation:*
> [W]e have drawn up a stage-by-stage plan of work...
>
> At the first stage we elaborated the draft law entitled "Fundamentals of the Russian legislation on the legal status of small Indigenous peoples" which was adopted by the Parliament on June 11, 1993.
>
> This Law reflects...

- collective rights of small peoples in bodies of state power and administration, in local representative bodies and local administration;
- legitimized ownership rights for land and natural resources in regions where such peoples traditionally live;
- guarantees for the preservation of language and culture.

The next stage consists in elaborating the specific mechanism for the implementation of this law. Work is under way on draft laws on family communities and nature use.[62]

The foregoing statements, made without reference to any specific treaty obligation, manifest the existence of customary norms. Evident in each of these statements is the implied acceptance of certain standards grounded in general human rights principles. And because the developments reported in these statements are independently verifiable, despite continuing problems not reflected in the government accounts, it is evident that the underlying standards are in fact guiding actual behaviour, at least to some extent. (Or, to use terminology advanced by Thomas Franck, the standards possess the quality of "compliance pull".)

Canada has participated actively in several international procedures responsive to Indigenous peoples' demands, acquiescing in if not leading the development of relevant international standards. Canada has been engaged in the deliberations of the United Nations Working Group on Indigenous Populations and has contributed regularly to the work of other international bodies addressing the subject of Indigenous peoples. At times Canada has resisted strong language protective of Indigenous peoples' rights — for example, its resistance to unqualified use of the term 'self-determination' in association with Indigenous peoples. At the level of substantive normative concepts, however, Canada has consistently revealed a posture in line with and at times at the forefront of the developing consensus among states.

The specific contours of a new generation of international customary norms concerning Indigenous peoples and binding upon Canada are still evolving and remain somewhat ambiguous. Yet the norms' core elements are confirmed and reflected repeatedly in the extensive multilateral dialogue and decision processes focused on Indigenous peoples and their rights.[63] These core elements – identifiable by any objective observation of the totality of pronouncements by states and other authoritative actors in international settings – themselves constitute already crystallized customary law generally binding upon the constituent units of the world community. This new and emergent customary international law can be summarized as follows:

1. *Self-determination*. Although several states have resisted express use of the term self-determination in association with Indigenous peoples, it is important to look beyond the rhetorical sensitivities to a widely shared consensus. That consensus is in the view that Indigenous peoples are entitled to continue as distinct groups and, as such, to be in control of their own destinies under conditions of equality. This principle has implications for any decision that may affect the interests of an indigenous group, and it bears generally upon the contours of related norms.
2. *Cultural Integrity*. Today there is little controversy that Indigenous peoples are entitled to maintain and freely develop their distinct cultural identities, within the framework of generally accepted, otherwise applicable human rights principles. Culture is generally understood to include kinship patterns, language, religion, ritual, art and philosophy; in addition, it is held increasingly to encompass land use patterns and other institutions that may extend into political and economic spheres.

Further, governments are held and hold themselves — increasingly to affirmative duties in this regard.

3. *Lands and Resources.* In general, Indigenous peoples are acknowledged to be entitled to ownership of, or substantial control over and access to, the lands and natural resources that traditionally have supported their respective economies and cultural practices. Where Indigenous peoples have been dispossessed of their ancestral lands or lost access to natural resources through coercion or fraud, the norm is for governments to have procedures permitting the indigenous groups concerned to recover lands or access to resources needed for their subsistence and cultural practices and, in appropriate circumstances, to receive compensation.

4. *Social Welfare and Development.* In light of historical phenomena that have left Indigenous peoples among the poorest of the poor, it is generally accepted that special attention is due Indigenous peoples in regard to their health, housing, education and employment. At a minimum, governments are to take measures to eliminate discriminatory treatment or other impediments that deprive members of indigenous groups of social welfare services enjoyed by the dominant sectors of the population.

5. *Self-government.* Self-government is the political dimension of continuing self-determination. The essential elements of a *sui generis* self-government norm developing in the context of Indigenous peoples are grounded in the juncture of widely accepted precepts of cultural integrity and democracy, including precepts of local governance. The norm upholds local governmental or administrative autonomy for indigenous

communities in accordance with their historical or continuing political and cultural patterns, while at the same time upholding their effective participation in all decisions affecting them left to the larger institutions of government.

Full implementation of the foregoing norms, and the safeguarding of Indigenous peoples' enjoyment of all generally accepted human rights and fundamental freedoms, are the objective of a continuing special duty of care toward Indigenous peoples. With heightened intensity over the last several years, the international community has maintained Indigenous peoples as special subjects of concern and sought co-operatively to secure their rights and well-being. Additionally, it is ever more evident that authoritative international actors expect states to act domestically, through affirmative measures, to safeguard the rights and interests of the indigenous groups within their borders. Any state that fails to uphold a duty of care toward Indigenous peoples and allows for the flagrant or systematic breach of the standards summarized above, whether admitting to their character as customary law or not, risks international condemnation.

As noted previously, the terms 'trust' and 'trusteeship' are not commonly used in contemporary international discourse concerning Indigenous peoples. Today, the principle of a special duty of care is largely devoid of the paternalism and negative regard for non-European cultures previously linked to trusteeship rhetoric. Instead, the principle rests on widespread acknowledgement, in light of contemporary values, of Indigenous peoples' relatively disadvantaged condition resulting from centuries of oppression. Further, in keeping with the principle of self-determination, the duty of care toward Indigenous peoples is to be exercised in accordance with their own collectively formulated aspirations. In this respect, there is a certain re-emergence of the consent/protectorate strain of trusteeship doctrine discussed earlier, but

without the state-centred conception of humanity that requires envisioning Indigenous peoples as 'nations' or 'states' in order for them to count as self-determining units.

International Conventions to which Canada is a Party

Canada's special duty or fiduciary obligation to Indigenous peoples is an aspect of its obligations as a party to the Charter of the United Nations, the most important multilateral treaty establishing the parameters of world public order. The charter incorporates the principle of "equal rights and self-determination of peoples", and it generally requires observance of all human rights and fundamental freedoms.[64] The charter's general requirement to uphold human rights attaches to all human rights norms whose contents become generally accepted by the international community.[65] As indicated by contemporary developments, norms concerning Indigenous peoples are a matter of human rights whose core elements are generally accepted today.

Other international treaties or conventions to which Canada is a party further inform the character of Canada's international obligation toward Aboriginal peoples. Canada is a party to the world's major international human rights conventions, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the International Convention on the Elimination of All Forms of Racial Discrimination.[66] These and other instruments set forth generally applicable human rights standards that bind Canada with regard to all those subject to its asserted sphere of authority, including, although not specifically, Aboriginal peoples.

Article 1 of both the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights affirms that "all peoples have the right of self-determination." Canada and other governments have tended to resist considering this provision as

applicable to Indigenous peoples as a result of sensitivities and confusion over the outer reaches of its implications. The overwhelming scholarly opinion, however, is that the self-determination provision common to the covenants implies obligations on the part of state parties with regard to Indigenous peoples.[67]

Evidently, this is the view of the United Nations Human Rights Committee, which is charged with overseeing compliance with the Covenant on Civil and Political Rights (CCPR), and it is increasingly the view of state parties to the CCPR. In reviewing the periodic government reports required by the CCPR, the Human Rights Committee has considered issues of political participation and group cultural and autonomy rights as falling under the purview of article 1 self-determination.[68] (As indicated below, however, the Committee has held that article 1 is outside the bounds of its jurisdiction to hear complaints pursuant to the first optional protocol to the convention.) In its 1992 summary commentary on the Colombian government's third periodic report, the Committee expressed its satisfaction at that government's reported progress toward implementing self-determination through efforts at securing democratic freedoms and the full equality of minority groups.[69] Referring to its obligations under article 1, the Colombian government had reported constitutional and other reform measures, including those intended to "enabl[e] the least advantaged groups to have an influence in the political life of the nation...".[70] The U.S. government went a step further in its 1994 report to the Committee, addressing extensively the rights and status of Native Americans under the rubric of article 1 self-determination.[71] The United States mentioned, among other things, rights pertaining to the self-governing capacities of Indian tribes and control over economic and cultural development. Although both the Colombian and United States reports

can be criticized for glossing over existing controversies, they nonetheless manifest the scope of coverage accorded article 1.

Also relevant is article 27 of the CCPR, which affirms the right of persons belonging to "ethnic, linguistic or religious minorities...in community with other members of their group, to enjoy their own culture, to profess and practise their own religion [and] to use their own language." The Human Rights Committee has interpreted article 27 in the particular context of Indigenous peoples to cover all aspects of a group's culture, understanding culture broadly to include economic or political institutions and land use patterns, as well as language and religious practices. This broad interpretation can be seen in the Committee's deliberations and commentary on government reports. In connection with Canada's 1991 report to the Committee, for example, the Committee examined a range of issues concerning Aboriginal peoples in Canada on the basis of article 27. These issues involved self-government negotiations with Indian communities, land claims, treaty rights, revision of the *Indian Act*, parliamentary representation, and the resolution of conflicts involving the Mohawk people.[72]

Also instructive in regard to the scope of article 27 are decisions of the Committee in exercising its jurisdiction to hear complaints of covenant violations pursuant to the first optional protocol to the covenant. In *Ominayak* v. *Canada* the Committee construed the cultural rights guarantees of article 27 to extend to "economic and social activities" upon which the Lubicon Lake Band of Cree relied as a group.[73] Thus the Committee found that Canada had violated its obligation under article 27 by allowing the Alberta government to grant leases for oil and gas exploration and for timber development within the Aboriginal territory of the band. The Committee acknowledged that the band's survival as a distinct cultural community was bound up with the sustenance that it derived from the land. On purely jurisdictional

grounds, the Committee declined to adjudicate the case on the basis of the right of self-determination affirmed in article 1. The Committee held that its jurisdiction under the optional protocol is limited to hearing complaints by *individuals* alleging violations of *individual* rights articulated in the covenant, and hence it could not address the merits of a complaint based on article 1 self-determination, which is a right of 'peoples'. The Committee held, however, that there is "no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights."[74] Thus, the Committee reached the merits of the case on the basis of article 27 and comprehensively addressed the problems raised by the Lubicon Lake Band's original factual allegations, from the standpoint of prevailing normative assumptions favouring the integrity and survival of Indigenous peoples and their cultures.[75]

Article 27 of the CCPR articulates "rights of *persons* belonging to" cultural groups, as opposed to specifying rights held by the groups themselves. It is apparent, however, that in its practical application, article 27 protects group as well as individual interests in cultural integrity. As the Lubicon Cree case indicates, rights connected with an indigenous culture, including rights connected with lands and resources, are meaningful mostly in a group context. It would be impossible or lacking in meaning for an indigenous individual to participate *alone* in a system of indigenous land tenure and communal resource use, to partake of a traditional indigenous system of dispute resolution alone, or to speak an indigenous language or engage in a communal religious ceremony alone.[76] This understanding is implicit in article 27 itself, which upholds rights of persons to enjoy their culture "*in community* with other members of their group." Culture is ordinarily an outgrowth of a collectivity, and, to that extent, affirmation of a cultural practice is an affirmation of the associated group.

Conversely, nonetheless — and as expressed more clearly by article 27 — the individual human being is, in his or her own right, an important beneficiary of the obligation of state parties to uphold cultural integrity. The relationship of the individual to the group entitlement of cultural integrity was signalled by the Human Rights Committee in the case of Sandra Lovelace. Lovelace, a woman who had been born into an Indian band residing on the Tobique Reserve in New Brunswick, challenged section 12(1)(b) of the *Indian Act*, which denied Indian status and benefits to any Indian woman who married a non-Indian. The act did not operate similarly with respect to Indian men. Because she had married a non-Indian, section 12(1)(b) denied Lovelace residency on the Tobique Reserve. She alleged violations of various provisions of the covenant, including articles proscribing sex discrimination, but the Committee considered article 27 as "most directly applicable" to her situation. In ruling in her favour, the Committee held that "the right of Sandra Lovelace to access to her native culture and language 'in community with the other members' of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists."[77]

While the Lovelace case emphasizes the rights of the individual, the Human Rights Committee's decision in *Kitok* v. *Sweden* demonstrates that a state's obligation to uphold the group's cultural survival may take priority.[78] Ivan Kitok challenged the Swedish Reindeer Husbandry Act, which reserved reindeer herding rights exclusively for members of Sami villages. Although ethnically a Sami, Kitok had lost his membership in his ancestral village, and the village had denied him re-admission. The Human Rights Committee acknowledged that reindeer husbandry, although an economic activity, is an essential element of the Sami culture. The Committee found that, while the Swedish legislation restricted Kitok's participation in Sami

cultural life, his rights under article 27 of the covenant had not been violated. The Committee concluded that the legislation was justified as a means of ensuring the viability and welfare of the Sami as a whole.

The International Convention on the Elimination of All Forms of Racial Discrimination, another human rights convention to which Canada is a party, is an additional source of relevant legal obligation. In addition to articulating substantive standards related to the principle of non-discrimination, the convention creates the Committee on the Elimination of Racial Discrimination (CERD) to evaluate compliance with the articulated norms. Like the Human Rights Committee, CERD has regularly considered government reports bearing on Indigenous peoples' rights. CERD has considered issues of Indigenous peoples within the general framework of the non-discrimination principle running throughout the convention, and not usually in connection with any particular article of the convention that governs the Committee's consideration of required periodic government reports. Within this general framework, CERD has acted much like the Human Rights Committee and effectively promoted the integrity and survival of indigenous groups in line with current developments in normative assumptions. As set forth in its published summaries of country reports and observations, CERD has considered and evaluated a broad range of issues corresponding with indigenous group demands.[79] Its queries of reporting governments from countries in which Indigenous peoples live demonstrate that the Committee expects governments to take concrete steps to secure Indigenous peoples' rights in connection with their obligations under the convention and to report those steps fairly comprehensively in their required periodic reports.[80]

In sum, Canada is bound to uphold Indigenous peoples' rights a result of being a party to a number of international conventions. The nature of this obligation under conventional law can be seen as

commensurate with the core of ILO Convention No. 169, and with customary norms that have developed over the last several years in response to Indigenous peoples' demands.

Conclusion

International law imposes on states a continuing duty of care, or fiduciary obligation, toward Indigenous peoples. This obligation rests on long-standing jurisprudential elements and decision processes found within the development of international law over centuries. Today, however, the normative parameters of this obligation are in a new and reformed generation of international standards, including those articulated in ILO Convention No. 169, as well as those discernible as new or emergent customary law. Canada is not a party to Convention No. 169, but it is bound to customary international law. The character of Canada's international obligation toward Indigenous peoples is also a function of its obligations under the United Nations Charter and international human rights conventions to which Canada is a party. Viewed comprehensively, Canada's contemporary fiduciary obligation under customary and conventional international law entails securing for Indigenous peoples the full enjoyment of human rights and, more particularly, securing for them rights of self-determination, cultural integrity, ownership or control over ancestral lands and resources, social welfare and development, and self-government.

Part II
The Relevance of the Right of Self-Determination of Peoples under International Law to Canada's Fiduciary Obligations to the Aboriginal Peoples of Quebec in the Context of Quebec's Possible Accession to Sovereignty

by Richard Falk

This paper emphasizes that portion of Canada's fiduciary obligations toward Aboriginal peoples that derives from international law, thereby adding to, and possibly qualifying, fiduciary obligations that derive from Canadian legal authority, whether constitutional, legislative, or judicial in nature. It is presupposed in this analysis that the government of Canada seeks to uphold international law in its approach to public policy on matters affecting Aboriginal peoples, especially with respect to their legal rights arising under international law.[81]

One can go further. The government of Canada is under a legal duty to uphold these rights. This is part of its broader obligation to respect international law. Such a duty does not include any commitment to ratify or internalize international treaties, but it does extend to that portion of international law that has been accepted in accordance with Canadian constitutional processes, as well as to rules and standards that are part of customary international law. The relevance of such a commitment is of great importance to the analysis that follows, providing an underpinning. It is not at all controversial in itself, but it often appears so because it is conflated with another issue – the identification of standards and rules that qualify for inclusion in the body of customary international law. Especially with respect to human rights and self-determination, which is a setting of rapid flux, there exists a zone of sharp controversy about whether to classify particular

claims as deserving of *legal* protection, as distinct from moral sympathy or political support.

The issue is central, and it needs to be articulated with respect to the rights and claims of Aboriginal peoples in Canada - specifically those residing in part or in whole within the province of Quebec – as they impinge upon the controversy surrounding Quebec's possible accession to sovereignty as a separate state. In essence, the underlying question is this: do the Aboriginal peoples enjoy a right of self-determination under customary international law and, if so, what are its specific consequences for determining the future relationship between Quebec and the government of Canada? Note that this question assumes that the issue is not resolved explicitly by treaty, although Canada is a party to the human rights covenants of 1966, and these do confer the right of self-determination on all peoples in a common article 1.[82] As far as specific instruments associated with Aboriginal rights, Canada is not formally a party, raising the issue of whether any standards contained in them have been incorporated into customary international law and, by this means, became obligatory for the government of Canada. This paper does not address the issue of whether Canada, on the basis of domestic initiative, has recognized such rights of Aboriginal peoples, although several authors appear to believe that this is the case to varying degrees.[83]

The approach taken here is to analyze emergent *customary* international law pertaining to Aboriginal peoples with special emphasis on the right of self-determination. The analysis proceeds on the basis of the following plan of organization:

1. a short discussion of historical background and evolution of authoritativeness with respect to the right of self-determination;

2. a consideration of the efforts of Aboriginal peoples to generate international law adapted to their values and claims and sensitive to their grievances;
3. an assessment of the legal consequences of these efforts, taking particular account of the experience in Europe since 1989 and of the Pellet Report; and
4. an assessment of whether the Aboriginal peoples of Quebec possess a right of self-determination under customary international law and, if so, its possible bearing on Quebec's sovereignty claims and, more specifically, on the discharge by the government of Canada of its fiduciary duties.

Historical Background and Evolution under International Law of the Right of Self-Determination

The right of self-determination emerged as a serious element in international life during the latter stages of the First World War. It emerged in two forms that prefigured, in their essence, the ideological rivalry between east and west that ripened decades later into the Cold War. The more radical version was articulated by Lenin before the Bolshevik Revolution, who in his writings as a revolutionary, proclaimed self-determination as an indispensable condition for peace in the world and meant it to apply unconditionally to the non-European peoples being held in the thrall of the colonial order. In Lenin's words, "the liberation of all colonies, the liberation of all dependent, oppressed, and non-sovereign peoples" is necessary for the maintenance of international peace.[84]

The more moderate version of the right of self-determination – the one more prominently associated with the subsequent development of the right – is, of course, that associated with Woodrow Wilson, and especially with his 14 points put forward as an authoritative statement

of the U.S. approach to the peace process in 1918. Wilson intended the principle of self-determination to apply immediately and unconditionally to the peoples of Europe, with particular reference to peoples formerly ruled by the Ottoman Empire and, to a lesser extent, by the Austro-Hungarian Empire. Wilson also intended, though in an ambiguous and half-hearted manner, self-determination to have some uncertain and eventual application in non-European settings. Wilson's fifth point embodies this aspect of his approach:

> A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

The U.S. secretary of state at the time, Robert Lansing, seemed disturbed by the wider implications of Wilson's formulation, making an effort to establish distance in relation to Lenin's views. Lansing tried to associate Wilson's views with the promotion of self-government *within* the colonial order, not the dissolution of the order itself, a prospect that he believed would be dangerous for "the stability of the future world".[85] This restrictive view was also expressed by Wilson's steadfast refusal at Versailles to meet with representatives of anti-colonial movements of national independence, including a youthful Ho Chi Minh.

As we now know, the Wilsonian restrictive version of self-determination prevailed at first. The colonial powers held onto their colonies and achieved considerable control over additional peoples by way of the mandates system established in connection with the creation of the League of Nations and incorporating the former colonies of the losing side in the First World War. The mandates system rested on a variable fiction, depending on practice, that the administering states

were accountable to the League for the well-being of the peoples involved as a "sacred trust of civilization", as this latter idea was expressed in article 22 of the Covenant of the League of Nations. Operational authority rested with the colonial power; the paternalistic language emphasizing the duty to promote well-being often meant little in practice, although there was a commitment to work toward independence for mandated peoples, and there were sharp differences in legal conception between the three classes of mandates, with Class A mandates being viewed as temporary, being replaced over time by political independence for the mandated people.

In retrospect, it seems evident that the Wilsonian top-down approach to self-determination was of limited application, while the Leninist approach caught on as a rationale for the extension of the ethos of anti-colonial nationalism that was to sweep the planet in the aftermath of the Second World War. In its essence, despite efforts to craft a conception of self-determination that did not disturb the established order, the idea itself is subversive to the legitimacy of all political arrangements between distinct peoples that do not flow from genuine and continuing consent. It is this subversive feature that works its way through the history of international relations for the remainder of the century, giving a variable and expanding content to the right of self-determination, whether the right is considered in relation to the identity of its claimants or the extent of substantive claims being advanced.

As the Second World War wound down, there was a repetition of the split between Leninist and Wilsonian views. The Soviet Union stood behind those elements in international society that were challenging the colonial order. The European powers, although weakened by the devastation of war, remained committed to retaining their colonies by force if necessary. The United States positioned itself

in the middle, allied with the colonial powers in many respects, yet drawn ideologically, in part by its own historical legacy, to the claims of peoples seeking independence. The United Nations Charter embodied this compromise in its specification of guiding principles, including the language of article 1(2): "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..." [86] Note that the Charter refers deliberately to self-determination as "a principle" rather than a right. It is only later on in both human rights and decolonization settings that official United Nations terminology confirms that peoples have a *right* of self-determination. Arguably, this is an inconsequential distinction, as a principle of international law, to the extent that it exists, implies the existence of rights and duties to ensure its application, or at least encompasses the prospect that such rights will, as appropriate, be specified.

The limits envisioned for the application of the principle of self-determination are also illuminated by reference to chapter XI of the charter dealing with "Non-Self-Governing Territories". On the one side, in article 73, the well-being of the inhabitants is affirmed as "paramount", but its implementation is left essentially in the hands of the administering state, in all instances a European or North American state (with the geographic, yet not political or ethnic, exception of South Africa). The central commitment is expressed in article 73(b) as one of working "to develop self-government", but not necessarily national independence. Article 76(b) does anticipate "advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstance of each territory and its peoples and the freely expressed wishes of the peoples concerned...". Again the normative content is ambiguous - paternalistic with respect to administration,

subversive in relation to aspiration. This trust concept in United Nations practice does not seem directly relevant to the rights and circumstances of the Aboriginal peoples of Canada, as such peoples have never been treated, nor have their representatives claimed, a trust status as understood in the United Nations Charter. The concept is relevant indirectly, perhaps, to the idea of fiduciary obligation, as the Aboriginal peoples of Canada are, to varying degrees, dependent peoples seeking, among other things, effective modalities of self-government, a quest that has been acknowledged increasingly, if not implemented altogether satisfactorily in Canadian practice, as documented in the constitutional part of this study (see *Volume 2—Domestic Dimensions*).

The right of self-determination has matured along three distinct, often overlapping, sometimes uneven and confusing, paths: that of morality, of politics, and of law. Indeed, the incorporation of self-determination into international law has lagged consistently behind advocacy (the moral debate) and practice (the political experience). The developments of this century in their several stages have witnessed an ebb and flow with respect to the multiple reality of self-determination but, cumulatively, a movement toward its legal acknowledgement and application across an expanded spectrum of circumstances. This expansion can be understood by reference to three sets of factors:

- the weakening of the capacity of the European colonial powers as a result of the two world wars;
- the rise of an ideology of nationalism, reinforced by the basic democratic perspective that governing arrangements, to be legitimate, should be genuinely consensual and participatory in relation to their citizenry; and
- the unconditional ideological, diplomatic support extended to anti-colonial struggles by the Soviet Union and its bloc after 1945, and the concern of the United States that the west would

lose out geopolitically in the third world if it tied its destiny to defence of the colonial order.

Against this background, the dynamics of decolonization gradually expanded the acknowledgement of a right of self-determination that increasingly resembled what Lenin had earlier had in mind. The great moment of acceptance came with the adoption of the famous Declaration on the Granting of Independence to Colonial Peoples in the form of a United Nations General Assembly resolution in 1960.[87] The thinking expressed in Resolution 1514 remains important in understanding the most recent post-colonial phases of struggle with respect to the application of the right of self-determination, although it does not attempt to clarify the specific legal content of the right, nor does it identify the circumstances of its application and their limits.[88]

The preamble of the declaration sets forth a litany of considerations that by 1960 had come express the content of the anti-colonial movement. The preamble recognizes "that the peoples of the world ardently desire the end of colonialism in all its manifestations" and that "the process of liberation is irresistible and irreversible and that...an end must be put to colonialism." Of particular relevance to the concerns of the Commission is the incorporation in the declaration on anti-colonialism of a broader ethos encompassing "all dependent peoples" and extending to vesting permanent sovereignty over "natural wealth and resources" in such peoples.[89]

The declaration's approach to the right of self-determination is instructive, in terms of its attempt both to confirm the right in relation to colonialism and to deny its wider application, keeping in mind the relationship of this right to the even more important set of claims associated with the territorial integrity of existing and emerging sovereign states. Operative provision (2) reads as follows:

> All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Provision (3) adds that "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence." These affirmations are then qualified by the now familiar deference to the territorial integrity of existing states contained in provision (6):

> Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

This approach culminated in the influential Declaration of Principles Concerning Friendly Relations Among States, adopted as General Assembly Resolution 2625 in 1970, which accepted the principle of self-determination (linked to the notion of "equal rights of peoples") as a constitutive norm of international order in the Cold War era.[90]

This approach was endorsed by Africa during the peak decade of decolonization, the 1960s, via the Organization of African Unity (OAU). By resolution in 1964 and frequent reiteration thereafter, the OAU agreed that colonial frontiers, even if arbitrary, were to be the basis for delimiting sovereign states in Africa as countries achieved independence. In effect, the African consensus on self-determination, so as to deny ethnic/tribal claimants any right of secession, reached a result equivalent to that of *uti possidetis*. Commenting on this development, Rosalyn Higgins argues that the OAU approach does not provide legal authority for *uti possidetis*, but that it reflects the African acceptance of "an underlying norm – that of commitment to territorial integrity and international stability."[91]

But as Higgins recognizes, matters are not so simple. Self-determination as a right also came to be an anchoring norm for human rights in settings unrelated to the decolonization setting. Higgins

attempts to resolve the tension by reference to the World Court treatment of the relationship in the *Burkina Faso-Mali* case, relying on an assertion by Georges Abi-Saab, the distinguished Judge Ad Hoc of Mali, to the effect that "[w]ithout stability of frontiers, the exercise of self-determination is in reality a mirage. Turmoil is not conducive to human rights."[92]

Unfortunately, such a resolution is not uniformly convincing if generalized. Its persuasiveness depends on the context. In some settings, it seems evident that only by re-establishing boundaries can turmoil be overcome and stability restored. The effort to maintain an abusive structure of dominance with respect to independence will often depend on a systematic denial of human rights, as has been the experience of Tibet and East Timor (since it was incorporated into Indonesia by force in 1975). What may have seemed convincing in Africa as decolonization was taking place seems more problematic 30 years later, at least as an invariable principle. Closely related to this political observation is the assertion of this paper that the contours of the right of self-determination are not fixed in the concrete of rigid legal doctrine, but have evolved continuously in response to the pressure of events, with respect to the prevailing moral and political climate, and in relation to the particularities of a given context.

Reflecting the potency of the anti-apartheid movement and the general revulsion against racism, the Declaration on Friendly Relations goes further than Resolution 1514, expanding upon the scope of self-determination in a manner not anticipated earlier. The language used in the declaration is again instructive with respect to understanding the expansionist history of the right of self-determination. The principle of territorial integrity is reasserted, but in a more conditional form. The declaration insists that nothing about the right of self-determination

> shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples...and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.

What is significant here is the potential receptivity to and loopholes for self-determination claims that are not strictly reconcilable with the primacy previously accorded unconditionally to territorial integrity and political unity.

There had always been a second dimension to the struggle for self-determination — not the collective struggle for national independence, but the individual and group quest for human rights. In this latter setting the exercise of the right of self-determination did not necessarily imply, as it did in the anti-colonial context, an insistence on the potential exercise of sovereign rights associated with statehood. Such a distinction led to discussions of 'internal' self-determination as appropriate for the protection of minority rights, which amounted to the avoidance of discriminatory and exclusionary policies arising in relation to race and religion, but also, in group settings, involved the linking of movements for cultural and political autonomy for distinct peoples with the right of self-determination.[93] But again, such a confining view of self-determination cannot be derived from the plain meaning of the textual language as it appears in the common article 1 of the two human rights covenants, which affirms the right without placing any limitations on its exercise. Nor can the scope of the right be restricted convincingly to article 27 of the Covenant on Civil and Political Rights, which declares that individuals belonging to "ethnic, religious or linguistic minorities" shall "not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and

practise their own religion, or to use their own language." Suppose that, after decades of repression and suffering, a people demands secession as a foundation for exercising their right of self-determination. Can we say conclusively, on the basis of international law doctrine and practice, that such a demand is unacceptable? The position of this paper is that we cannot reach an invariable conclusion but must assess the merits of such a claim in its particular context. A specious legal clarity is insisted upon by those who continue to rely on a cautious reading of the Friendly Relations declaration and of some of the rather tangential findings and assertions of the International Court of Justice, especially in the *Western Sahara* case.[94]

In this regard, this paper is close to the position of Judge Hardy Dillard, as expressed in his oft-quoted phrase from his separate opinion in *Western Sahara*: "It is for the people to determine the destiny of the territory and not the territory the destiny of the people." (p. 122) Higgins criticizes Dillard's orientation here, by showing clearly that the court confirmed the relevance of the right of self-determination only after concluding that Western Sahara should be regarded as a Spanish colonial possession of separate identity and not as belonging within the sovereign domain of either Morocco or Mauritania. Such an assessment is persuasive within the four corners of the dispute about Western Sahara, but Judge Dillard is both accurate and prophetic with respect to the most appropriate legal comprehension of the variable content of the right of self-determination.

Two tendencies that pull in opposite directions are evident in the international law literature: the first is to hold the line against expanding the right of self-determination by insisting on the persisting relevance of territorial unity of existing states as an unconditional limitation on its exercise; the second is to validate recent state-shattering practice in a reformulated legal approach that acknowledges the unsettled character

and scope of the right but takes note of the degree to which diplomatic recognition and admission to the United Nations have been granted to entities formerly encompassed by the Soviet Union and Yugoslavia.[95]

In supporting her continuing adherence to the more restrictive view of self-determination, Rosalyn Higgins writes that the long struggle to establish the right as legal "now faces a new danger: that of being all things to all men."[96] Yet the whole history of the right of self-determination is adaptation to the evolving struggles of peoples variously situated to achieve effective control over their own destinies. For a period the states agreed that self-determination would not have secessionist implications except in colonial settings. This attitude was acceptable to the Soviet Union, appreciating the explosive potential of giving captive nations within its sovereign boundaries or captive peoples within its bloc any encouragement in relation to their assertion of rights of independence. At the same time, the former colonial peoples were in general agreement that opening up colonial boundaries for revision would be an open invitation to political disunity and widespread warfare, especially in Africa. Further, the United States and other countries in the western hemisphere were aware that Aboriginal or Indigenous peoples within their boundaries continued to insist on their status as sovereign nations. There was thus a political consensus among governments that shaped the legal conception of the right of self-determination during the Cold War, but it was an historically conditioned conception that does not hold in the period since 1989. In the last five years, the practice of states, the transnational assertiveness of Indigenous peoples, and the underlying morality of group rights have expanded the scope of the legal right of self-determination, making its content closer to that associated with Judge Dillard's dictum and making the more flexible international law approach more useful than its restrictive counterpart, which purports a clarity and definiteness that

are quite arbitrary, especially if applied to deny rights of self-determination to Aboriginal peoples.

Status under Customary International Law of Claims of Entitlement by Aboriginal Peoples in Canada to Enjoy a Distinct Right of Self-Determination

Two elements of historical experience are relevant: (1) a pattern of encroachment on the scope of rights and autonomy enjoyed by Aboriginal peoples; and (2) the acknowledgement that such peoples were distinct and, as such, could claim rights of self-determination as appropriate claimants.

The emergence of customary international law concerned *specifically* with Aboriginal peoples has occurred recently. Arguably, the rights of such peoples existed earlier, although in a paternalistic mode, as a subset of various categories of dependent peoples protected under general international law. In reality, however, the distinctive circumstance of Aboriginal peoples received almost no explicit attention in the literature of international human rights until about 15 years ago. What little attention was accorded tended to support an assimilationist approach, which turned out to be a denial of what Aboriginal peoples and their representatives seek overwhelmingly to achieve as of the 1990s.

A focus on the right of self-determination sharpens inquiry. Such a right, as shown in the previous section, has been taking shape in international life since the end of the First World War, with its emergence disclosing a still largely unresolved intermeshing of moral, political and legal factors. Representatives of Aboriginal peoples regard their experience of alien domination as equivalent to that of colonization – indeed of colonization in its most acute form – often threatening the very physical and ethnic survival of the 'colonized' people. To the

extent this line of analysis becomes acceptable, it would be clear that all Aboriginal peoples would enjoy the right of self-determination as a colonial people and hence the right, if so insisted upon, to an appropriate form of independence. Governments, including Canada's, have so far resisted this classification of Aboriginal claims, asserting that whatever rights exist in international law must be conferred explicitly and must be accepted formally by any state with a duty to accord them respect.

The initial attempt to take explicit steps by way of protective standards on behalf of Aboriginal people was in the setting of International Labour Organisation by way of Convention No. 107, the convention on protection of Indigenous populations, adopted in 1957. Although this convention was widely ratified by governments and did acknowledge the problems of abuse arising from the treatment of Aboriginal peoples in many settings, it was essentially an anti-discrimination approach that was formulated without the participation of representatives of the peoples concerned (and hence paternalistic) and presupposed that adequate protection was a matter of providing the basis for non-discriminatory inclusion or assimilation (and hence insufficient). It also used the label 'populations' to avoid the implication of 'peoples' as possessors of a right of self-determination. By this trick of semantics, supposedly, any claim on behalf of Aboriginal peoples to self-determination or independence could be avoided.[97]

This approach was superseded by Convention No. 169, adopted in 1989, which was a result of criticism by and some consultation with representatives of indigenous groups, shifting emphasis from individual participatory rights to group or collective concerns with rights and, above all, with the retention of group identity and control over collective destiny. In Convention No. 169 the issue of self-determination is evaded rather than resolved one way or the other, reflecting

Aboriginal pressures to acknowledge the right and the opposing anxieties of leading governments that a direct acknowledgement could and probably would be construed as equivalent to legitimating secessionist demands by analogy to the process of decolonization and could jeopardize financial interests and resource claims of dominant elites. The compromise struck was to impose on states the duty to uphold the aspirations of Indigenous peoples, through the medium of consultation, yet to withhold a direct and unambiguous acknowledgement of a right of self-determination.

Thus the official title is Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, but article 1(3) withdraws some of the apparent benefit associated with the momentous linguistic shift from 'populations' to 'peoples' by saying that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implication as regards the rights which may attach to the term under international law." This is certainly a strange formulation, especially if read in conjunction with article 3(1) confirming that "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination...". Yet prime among these human rights and fundamental freedoms is the right of self-determination! Moreover, article 3 confers this right on the collective actor, not the individual, thereby blurring the issue further. In reality, Convention No. 169 is trying to establish a *de facto* regime of rights premised on the ethos of *internal* self-determination, but it is fearful that an authoritative acceptance of the terminology of self-determination would be unacceptable to Aboriginal peoples if so qualified, yet provocative with respect to states if affirmed in an unqualified form, as it would thereby raise the spectre of secession as a legal right with its various potential adverse financial implications.

It is against this background that we should see the struggle of Aboriginal peoples being waged on a global level, primarily in the setting of the United Nations Working Group on Indigenous Populations, established under the general auspices of the United Nations Human Rights Commission in 1982 and meeting almost every year since then in Geneva. The principal vehicle of this struggle in recent years has been the Draft Declaration on the Rights of Indigenous Peoples; within that effort, the claim and formulation of the right of self-determination have unquestionably been the centrepiece. On the Aboriginal side the effort has been to ensure the explicit inclusion of the right of self-determination in unrestricted form, while on the state side the effort has been to avoid according such a right full legal recognition, especially as a matter of collective application. The issue is of great symbolic importance to both sides, but whether it is of substantive importance at this time in history is questionable. For reasons to be discussed, aside from the inherent value of self-esteem, the *actual* aspirations of Indigenous peoples are satisfied in almost every case by the full and fair implementation of an ethos of internal self-determination, including its participatory (non-paternalistic) application, especially on matters that affect the Aboriginal community, but such a formal foreshortening at the level of doctrine is viewed widely as a denial of the sovereign character of an Aboriginal people or nation. In turn, this denial is treated as conferring, at best, an unacceptable second-class right of self-determination; as such, it is considered politically unacceptable.

There are two quite different ways to consider the relevance of the right of self-determination to the circumstances of Indigenous peoples in Canada at this time. The first of these raises the question of whether such peoples have been victimized by alien or even colonial rule of the sort that qualifies them for the right, while the second

considers the relevance of the process by which these peoples have been working to gain acceptance of a Universal Declaration on the Rights of Indigenous Peoples within the framework of the United Nations (that is, through the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, established by the United Nations Commission on Human Rights).

As is well known, the situation of Indigenous peoples was not the object of any specific attention in the drafting of the Universal Declaration of Human Rights or the two subsequent covenants. At the same time, the generality of the norm of self-determination embodied in article 1 of the two human rights covenants could accommodate its extension to Aboriginal claims by virtue of such groups qualifying as peoples. Such an extension has never been confirmed officially, and there is a body of expert opinion that regards this right as available only to individuals as members of a group rather than to the group as such. In the setting of Aboriginal claims, the emphasis is on the collective nature of the rights at stake, especially with respect to self-determination. Thus, without a distinct confirmation of the collective nature of the claim, the human rights route to the right of self-determination would not appear to suffice to establish the right in the form in which it is being asserted on behalf of Aboriginal peoples. The inclusion of such a right in a Universal Declaration on the Rights of Indigenous Peoples would establish the legal right, provided the instrument itself qualified or came to be accepted as reflecting or establishing general international law. It should be appreciated that the Universal Declaration of Human Rights, which is now accepted widely as incorporated into international law in the most authoritative form (as embodying peremptory norms), was not regarded in any sense as an obligatory instrument at the time it was adopted.

However, as far as the protection of human rights is concerned, it is often alleged that there is no implied option to secede unless the structure of governance is exceedingly oppressive.[98] Such a generalization seems accurate enough in assessing claims from a strictly juridical viewpoint, but it does not encompass the most striking aspect of experience: namely, the practice of self-determination suggests, especially recently, that if a people can secede from a state as a matter of fact and have this circumstance formally acknowledged within the international community, then, in effect, state-shattering, territory-fracturing secessionist claims become the operative basis for exercising a right of self-determination.[99]

It is misleading to insist on the invariable unavailability of secessionist forms of self-determination, but it is even more misleading to suppose that the implications of an exercise of the right of self-determination are inherently secessionist in character. The overwhelming weight of currently available evidence on Aboriginal attitudes suggests two facets of the standard approach to claims arising from the right of self-determination: an effort to achieve self-governing arrangements and protection of traditional rights, especially pertaining to traditional land rights, within the structure of an existing state, and an insistence that no restrictions or exceptions be placed on the potential scope of claims. Any such restrictions or exceptions are viewed as demeaning challenges to the sovereignty of Aboriginal nations and hence unacceptable on their face. This latter insistence inevitably invites suspicion and anxiety that the real goal of Aboriginal peoples is secession, with the more moderate program serving as a reassuring disguise of intentions or a temporary expedient.

Erica-Irene Daes, Chairperson and Special Rapporteur of the United Nations Working Group on Indigenous Populations and an

observer of notable stature, has expressed one side of this emergent right of self-determination:

> ...indigenous people have the right of self-determination, and...the existing State [within which the Indigenous people is located] has a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. This approach would also mean that indigenous peoples have the duty to reach an agreement, in good faith, on sharing power within the existing State, and, to the extent possible, to exercise their right of self-determination by this means.[100]

What Daes has in mind is a restructuring of states to accommodate, within their territorial boundaries and constitutional arrangements, spheres of autonomy established on the basis of negotiations, not by way of reversible top-down concessions. Note, however, that Ms. Daes' formulation contains loopholes that would be consistent with the assertion of secessionist claims in exceptional circumstances that are left unspecified.

In the background of this effort to identify some middle ground is the empirical view "that most indigenous peoples acknowledge the benefit of a partnership with existing States in view of their small size, limited resources, and vulnerability" and that "[i]t is not realistic to fear indigenous peoples' exercise of the right of self-determination."[101]

Ms. Daes sees the "far more realistic fear" as being that the denial of a right of self-determination "will leave the most marginalized and excluded of all the world's peoples without a legal, peaceful weapon to press for genuine democracy in the states in which they live."[102] Note that this view of the right of self-determination for Indigenous peoples is based on the possibility of renegotiating democracy on the basis of mutuality, which would have to include provision for group rights, as well as rights of individuals. In many respects, as other studies prepared for the Commission establish, the

government of Canada has been a leader in developing the substance of such an approach, but without being willing as yet to do so as a matter of international obligation or in deference to the right of self-determination enjoyed by Aboriginal peoples under emergent international law. Because an important part of what is at stake is the recovery of Aboriginal self-esteem after centuries of abuse and humiliation, the symbolic importance of acknowledging this right of self-determination is of utmost political importance in achieving reconciliation as a practical matter, even if it cannot be declared unequivocally to be a feature of customary international law at this point. Indeed, Canadian resistance to the formalization of this right is part of what arguably prevents such a status from being established more definitely in international law.

In the context of a possible accession to sovereignty by Quebec, such a formalization or recognition of rights by Canada would have a complex and distinctive bearing. The various Aboriginal peoples affected by the division of the existing state of Canada would clearly have an appropriate participatory right in any negotiations, presumably as full and equal participants so far as their own interests were at stake. This application of self-determination as ensuring participation, then, is better understood as a foundation for *internal* reform than as the opening wedge in a struggle to achieve independent statehood for Aboriginal nations. In effect, acknowledging the sovereign rights of Aboriginal peoples is a means to encourage negotiated solutions of internal reform within or between existing states, and secessionist scenarios are diversionary. However, in the event that secession threatens to remove particular Aboriginal peoples, in whole or in part, from their current affiliation within a state, then their right of self-determination, to the extent it is exercised, requires their consent to any changes or, absent such consent, a successfully negotiated adaptation to

a new political framework, which in this instance would arise in the event of secession by Quebec.

The status of rights under international law enjoyed by Aboriginal peoples relative to the government of Canada is in flux, although the momentum of recent developments is in the direction of establishing, as a minimum, the enjoyment of a collective right of internal self-determination, including participation in shaping its application to specific circumstances. Any change in circumstances that would have an impact on existing collective arrangements and rights would be an occasion for mandatory consultation and negotiation. This seems directly relevant to any impending moves toward an accession to sovereignty by Quebec. What remains uncertain is whether the formal delimitation of the right of self-determination is anchored in the human rights evolutionary path contained in the influential General Assembly Resolution of 1970, and hence restricted, or is also an aspect of the legal maturation of the Friendly Relations evolutionary path, and hence is doctrinally unrestricted. This uncertainty is not of obvious substantive relevance, as there is no evidence to suggest the presence of secessionist claims (as distinct from residual rights) on the part of Aboriginal peoples. The scope of the duty to consult is potentially troublesome in the event that a mutually acceptable adjustment is not achieved. In this event, a complex tangle of claims would need to be resolved, possibly by recourse to some arbitral procedure. Aboriginal peoples, or at least some of them, would likely claim to retain their status and operational reality as part of a federated Canada rather than become a part of Quebec. Whether this is practical on a functional basis or negotiable on a political basis has been left unresolved.

Relevance of Post-1989 Practice with Respect to the Former Soviet Union and Former Yugoslavia and of the Pellet Report

International practice until 1989 had emphasized the United Nations consensus on an emergent right of self-determination for peoples held under colonial, alien, or racist rule, to be exercised in a manner that did not challenge prior external boundaries. Even in this period, the 1972 secession of East Pakistan from Pakistan to form Bangladesh, in the wake of atrocities perpetrated by the armies of the central government, was widely recognized by other states. Not long after, Bangladesh became a member of the United Nations, although its emergence clearly altered the external boundaries of the former Pakistan. Such an outcome was substantively an exercise of the right of self-determination by the peoples involved, even if not so described at the time. The quest for a national homeland by the Palestinians, the various Kurdish national movements, and the struggles of ethnic groups in the former Soviet Union are definitely becoming part of the subject-matter of self-determination, whether the outcomes are consummated internally through autonomy arrangements or through the establishment of new states.

The disintegration of the Soviet Union and Yugoslavia in 1991 involved establishing a series of new, sovereign states that sought diplomatic recognition and full membership in international institutions. In effect, these emergent states shattered the territorial unity of the former federated entities and departed from the apparent intent of United Nations guidelines premised on always exercising the right of self-determination *within* existing states. This practice is significant confirmation of the extent to which effective political outcomes — and community responses by way of recognition and admission to international institutions — have transcended earlier efforts to disallow self-determination claims of the state-shattering variety. Nevertheless,

the widely threatening character of political movements seeking to challenge territorial unity generates pressure to distinguish precedents in which secessionist results have yielded new states by diminishing the territorial domain of a former state. This tension between practice and doctrinal preference, as expressed in the opinions of the Badinter Commission and the Pellet Report, generates very confused legal analyses of the scope and character of the right of self-determination, especially during this post-Cold War period of severe flux.

One example of such confusion is the work of the Arbitration Commission established by the European Community in 1991 as part of its effort to end the violent conflict attending the breakup of Yugoslavia. The Commission was composed of five presidents of constitutional tribunals in their respective European countries and was headed by Robert Badinter, president of France's Constitutional Council. This Arbitration Commission - the Badinter Commission, as it came to be known – lacked legal authority to decide but was given an advisory role in relation to the continuing peace diplomacy; despite its name, it had no arbitration functions. Lord Carrington, president of the International Conference on Yugoslavia at the time, put several questions to the Commission, as did the government of Serbia.[103]

In Opinion No. 2, the Commission addresses self-determination in the context of Serbian claims in relation to Croatia and Bosnia, concluding that although the right of self-determination is not spelled out, "...it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise." In its tersely worded opinion the Commission says that Serbians are entitled to full protection as "minorities" and that the right of self-determination is a matter of

human rights, allowing Serbs acting as individuals, if they so wish, to have their distinct national identity respected by Bosnia and Croatia.

The Commission never discusses the crucial issue relating to when a minority becomes a people and thus seems to miss the main point: the right of self-determination as a collective right of a people, the scope of which is determined by a mixture of context (suppose, as in Bangladesh, the claimant people is being victimized by systematic atrocities) and effective outcome (the facts created). As Hurst Hannum points out in his devastating critique of the Commission's work, the commissioners "appear to have based their judgments on geopolitical concerns and imaginary principles of international law, rather than on the unique situation in Yugoslavia."[104] He contends that "[t]he principle that borders should not be altered except by mutual agreement has been elevated to a hypocritical immutability that is contradicted by the very act of recognizing the secessionist states."

Furthermore, the Commission's extension of the *uti possidetis* approach in Opinion No. 3 to *internal* administrative boundaries of a fragmented state rests on shaky grounds of policy and legal authority. The emergent legal authority in the decolonization setting was directed at the maintenance of *external* boundaries. The opinion invokes some language of the International Court of Justice (ICJ) in the dispute between Burkina Faso and Mali to the effect that *uti possidetis* "is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles."[105] As Hannum points out, the Badinter Commission left out the end of the sentence in the ICJ decision, which reads, "provoked by the challenging of frontiers following the withdrawal of the administering power."[106] Further, the

court's dictum concerning *uti possidetis* is limited explicitly to situations arising out of decolonization. None of these considerations seems to apply, even indirectly, to the circumstances of Aboriginal peoples caught up in a secession process not of their making; the question posed is not frontiers, but affiliation and preservation of self-government and unimpeded land rights, including those of full and meaningful participation in any change of status.

The crucial point here is that the unconditionality of respect for territorial unity has been breached decisively in relation to the former Yugoslavia and that the separation movements launched by these developments were operationally invoking their right of self-determination even if the rhetoric was not relied upon. This entire process was validated indirectly by according widespread diplomatic recognition to these new states, thereby legitimizing their challenges to territorial unity. In effect, what is accepted is valid and cannot be predetermined completely by consulting abstract legal guidelines. The fact that claims of independent statehood have generally corresponded with prior internal boundaries does not alter this breach of the fundamental effort of international law during the Cold War era to reconcile the territorial unity of existing states with the exercise of the right of self-determination, with colonies being considered as unified entities.

The confusion arising from the opinions rendered by the Badinter Commission has been compounded in several respects by the 1992 Pellet Report, prepared for a committee of the Quebec National Assembly by Alain Pellet and four other distinguished international law experts on issues relating to the accession of Quebec to sovereignty.[107] It is important to appreciate, first, the limited scope of the Pellet Report. The authors were careful to restrict their response to the questions put to them, which in my judgement do not properly cover the topic,

especially in relation to the extent and meaning of participatory rights belonging to Aboriginal peoples. The report also makes a point of suggesting that the questions "were asked exclusively from a legal perspective, and this study intends to situate itself solely within the field of law."[108] If such language means only that "[i]n no way does it reflect any political preferences" of the authors, then it is quite unexceptional. But if it purports, as does seem to be the case throughout its analysis of the issues, that the law is autonomous and clear — without taking into account the alternative lines of interpretation being posited by diverse, often antagonistic, political and moral perspectives — then it is quite misleading. The issues posed are so challenging, in part, because their disposition cannot be resolved solely by law and therefore inevitably confer on the government of Canada an opportunity and a responsibility to resolve such claims in the manner that contributes best to the clarification of respective rights and duties.

In so far as Aboriginal peoples are concerned, the Pellet Report concentrates on whether a right of self-determination exists, but with the assumption that, if it does, then the crucial question is whether a claim of territorial independence is thereby included and validated. True, such a claim is one outer limit of an unencumbered right of self-determination; but in the setting of issues posed by accession to sovereignty through negotiations, many other questions are posed, including the right to remain attached to Canada, which from an international law perspective is the existing territorial unit. If accession to sovereignty by Quebec is taken as already established, then the assertion by Aboriginal peoples of a right to remain part of Canada would have the legal appearance of challenging the territorial unity of the new state of Quebec.[109] Such a mode of analysis seems highly artificial, given the unresolved character of the underlying separatist claims and the claim of a right to participate in whatever process is

established to resolve the future status of Quebec and its relationship to Canada.

On the nature of self-determination, which the Pellet Report notes correctly as "the heart of the controversy", the basic view of the right as one "of variable geometry", to be applied in each instance in accordance with the wishes of the people involved, is also accurate. More dubious, however, is the false clarity of the assertion that the right of self-determination "is sufficient *only in colonial situations* to found the right of a people to acquire independence to the detriment of the State to which it is attached."[110] On the basis of both the more open-ended textual authorities, including the declaration on Friendly Relations, and diplomatic practice since 1989, starting with the Baltic republics, the possibility of such claims of independence in non-colonial situations is certainly not legally precluded at this stage, nor are the parameters of such a right firmly fixed as yet, if they ever will be. The law is in flux, especially pertaining to Aboriginal peoples, and is likely to remain so for the indefinite future, reflecting the ebb and flow of both practice on the ground and doctrine as interpreted by various concerned actors.

The Pellet Report also conveys a false impression of definiteness in law with respect to the treatment of the breakup of former Yugoslavia. Unlike the Badinter Commission, the Pellet Report does acknowledge, in discussing the *Burkina Faso-Mali* case, that the circumstances of Quebec are different from those arising in the setting of decolonization. It claims, nevertheless, its applicability on the basis of its "logic" pertaining to all situations "of accession to independence". But then comes the misleading inference: "all new States issuing from secession from a pre-existing State have retained their pre-existing administrative boundaries, be they Singapore, Yugoslav republics, or States produced by the division of the Soviet Union; and in the latter

two cases, the international community has very firmly manifested its conviction that there is a rule in such situations that had to be respected."[111]

In fact, however, the international community has exhibited considerable ambivalence with regard to the pre-existing boundaries internal to Yugoslavia, especially with regard to its efforts to resolve the war in Bosnia. The Vance/Owen and Owen/Stoltenbery diplomatic initiatives, with broad United Nations backing, have involved radical redrawing of boundaries within Bosnia, even in some scenarios envisioning new confederations or federations that link ethnic portions of Bosnia with Croatia and Serbia. The point here is that the firmness of the boundaries is not fixed by law and that their outcome is shaped by an assessment of the context.

Perhaps the most confusing dimension of the Pellet Report is its insistence that the emergence of a new state "is not a problem of law, but of fact."[112] Of course, if a new state is postulated to exist, then the assertion is true, yet trivial. Such a formulation deflects attention from the most crucial aspect of the actual situation: given diverse and inconsistent claims based on appeals to the right of self-determination, under what conditions can a new state come into existence validly, validity being assessed primarily by diplomatic recognition in the international community and by admission to international institutions? Providing guidance on this question was outside the scope of inquiry of Pellet and his colleagues, but this limitation greatly restricts the relevance of its findings and recommendations. Such a limitation of scope also renders dubious the central conclusion of the Pellet Report that Quebec under no circumstances can be authoritatively influenced to alter its territorial domain in the course of accession to sovereignty.[113] This impression of limits is very misleading here, as the process of accession is a matter of negotiations, where competing claims will need

to be reconciled to the extent possible on the basis of legal guidelines and their enlightened application.

A similar line of objection applies to the treatment of the emergent right of self-determination in the Pellet Report. It argues unpersuasively that the full right of self-determination – that is, including secession – pertains only in colonial situations. For one thing, the report assumes, without demonstrating, that Aboriginal peoples are not appropriately entitled to claim rights as a species of 'colonial'. The literature on the subject suggests a growing disposition to view Aboriginal peoples as victimized by extreme forms of colonization and thus entitled, even at this late stage, to act upon such identity and whatever legal rights it implies. For another, the crucial immediate issue here is one of participatory rather than secessionist rights, which are acknowledged by the Pellet Report to pertain to all peoples (including those not entitled to claim independence because they are non-colonial).[114] Yet because the report takes accession as consummated, it does not explore the ramifications of such participatory rights except in the most general terms:

> For colonial peoples, this choice includes the possibility of independence; for others, it excludes independence, but signifies at once the right to one's own identity, the right to choose, and the right to participate.[115]

It seems evident, from the context and reference to Thomas Franck's article on the emergent norm of democratization, that participation, in the Pellet Report, means democratic inclusion on a non-discriminatory basis and nothing else.[116]

As argued here, it is the interpretation of the significance of this right of participation – a common ground between this study and the Pellet Report – that needs to be specified with respect to the unfolding and unresolved contingency of an attempted accession to sovereignty by Quebec. It is only by postulating an independent Quebec as an

established fact that the Pellet Report makes the question of secession so central to the assessment of the rights of the Aboriginal peoples involved.

The Pellet Report affirms correctly that the rights of Aboriginal peoples are emergent and that the positing of a right of self-determination in the Draft Declaration on the Rights of Indigenous Peoples is likely to become a significant influence, although its degree of authoritativeness and impact remain in doubt. But the whole matter of the existence of such a right is determined to be "of little consequence", because even in "the broadest conception of rights contemplated for aboriginal peoples, nowhere" is it "provide[d] that they should have a right of secession."[117] This puts the whole matter of self-determination as it relates to Quebec in a quite misleading light. No claim is now being made or contemplated on the issue of secession by Aboriginal nations. It is, at most, a matter of assessing whether there exists an outer limit restricting the right of self-determination should secession be claimed. The central claim of Aboriginal peoples is not secession, however, but their right to avoid any change of circumstances that is perceived to be harmful to their existing arrangements and future prospects; if any change of circumstance is contemplated, the further and related right claimed is the right to full consultation and participation, on the basis of parity with representatives of Quebec, not just as a formality or an afterthought designed merely to work out an arrangement that approaches Quebec's separation as a *fait accompli*.

PART III
Canada's Fiduciary Obligation to Indigenous Peoples in Quebec and the Recognition of Quebec as a State

by Donat Pharand

In the event of Quebec secession, certain questions arise with respect to Canada's fiduciary obligation to the Indigenous peoples located on Quebec territory. Could Canada insist, as a condition of its recognition of Quebec, that its fiduciary obligation be fully assumed? Could other states make their diplomatic recognition subject to similar guarantees? These and other related questions are addressed under two main headings: the role of recognition in international law, and the application of the law to a seceding Quebec.

The Role of Recognition in International Law

Recognition in General

The recognition of a state presupposes the existence of three criteria for statehood: a fixed territory, a population and an effective government. Even when those criteria have been met, however, the new state cannot enter into relations with other states until it has been recognized by them. Such recognition constitutes the official acknowledgement that a new state has come into existence and that the recognizing state is ready to enter into formal relations with it. Recognition of a new state also necessarily implies the recognition of the government exercising authority at that time.

Is There a Duty to Recognize?

In practice, the question arises of whether there is a duty to recognize a state when it has met the three main criteria for its existence. Or is

recognition merely discretionary? The question is not altogether settled in international legal theory. There are two main schools of thought on the question. The first, subscribing to the *constitutive theory*, maintains that recognition is strictly a political act and, in effect, creates the state, although it possesses the necessary elements before recognition. The other school, subscribing to the *declaratory doctrine*, believes that recognition is a legal act and, when a new state has met the criteria for statehood, there is a duty on the part of other states to accord recognition.

This was one of the first questions addressed by the International Law Commission in the Draft Declaration on the Rights and Duties of States of 1947. The members of the Commission were divided on the proposal presented by Panama that "every State is entitled to have its existence recognized".[118] A majority of the members believed, however, that such a provision would go beyond generally accepted international law. Consequently, the Commission decided to remain silent on this question.

In practice, states have followed a middle course between those two doctrines. The dominant view is that recognition does not create a state — it exists when the legal requirements are met — but recognition is a political and discretionary act. In 1929, the Polish-German Mixed Arbitral Tribunal decided, with respect to recognition of Poland, that "the recognition of a State is not constitutive but simply declaratory". The Tribunal added that "the State exists by itself and recognition is nothing more than the declaration of its existence, recognized by the States from which it originates".[119] However, even accepting this view, an unrecognized state has a relative existence. It is recognition by the generality of states that will permit it to exercise the rights of statehood, and recognition is completely discretionary. This was the position taken by the Institut de Droit international in 1936 in a

resolution saying that "each subject of international law remains free to grant or refuse recognition of any kind".[120]

That recognition is a discretionary political decision was also the view taken by the majority of states in their comments in 1949 on the draft declaration prepared by the International Law Commission. For instance, the United Kingdom stated that "whether a State enters into diplomatic or other relations with another State is, and must remain, a matter for purely political decision".[121] In the same way, the government of the United States observed that "whether and when recognition would be accorded is a matter within the discretion of the recognizing State". The United States added that "States are free to accord or withhold recognition; and if they are free to withhold it, they have the right to accord it conditionally".[122]

Conditional Recognition: The Case of Eastern Europe

The question of conditional recognition was discussed in the European Council at the time new states were being formed in Eastern Europe and the former Soviet Union. In December 1991, the ministers of the European Community adopted five conditions or guidelines on formal recognition of those new states:

> *(i) respect for human rights in main international instruments:* "respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights";
> *(ii) guarantees for ethnic minority rights:* "guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE [Conference on Security and Co-operation in Europe]";
> *(iii) respect for the inviolability of frontiers:* "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement";
> *(iv) commitment to disarmament and nuclear non-proliferation:* "acceptance of all relevant commitments with

regard to disarmament and nuclear non-proliferation as well as to security and regional stability"; and

(v) commitment to settle succession disputes by agreement or arbitration: "commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes".[123]

These guidelines were then applied by a five-member Arbitration Commission, the members being the presidents of the constitutional courts of France, Germany, Italy, Spain and Belgium. Since the European Council did not specify what law the Arbitration Commission (which came to be known as the Badinter Commission) was to apply, the Commission decided to submit its opinions "essentially on the basis of public international law, including references to the peremptory norms of general international law (*jus cogens*)".[124] The Commission had to give its opinion on the request for recognition by the following: Bosnia-Herzegovina, Croatia, Macedonia, Slovenia and Serbia/Montenegro. Although the opinions of the Badinter Commission were only advisory, the European Council generally adopted those opinions in its decision on recognition.

The Badinter Commission followed the practice of states summarized above. On one hand, it considered that "the existence or disappearance of a State is a question of fact; that *the effects of recognition by other States are purely declaratory*".[125] Applying this rule to Serbia and Montenegro after the breakup of Yugoslavia, the Commission felt that "within the frontiers constituted by the administrative boundaries of Montenegro and Serbia in the SFRY [states of the former Republic of Yugoslavia] the new entity meets the criteria of international public law for a State".[126]

On the other hand, the Commission stated that this new state "does not *ipso facto* enjoy the recognition enjoyed by the SFRY under completely different circumstances." It was "for other states, where

appropriate, to recognize the new state". The Commission concluded by stating that recognition of Serbia/Montenegro by members of the European Community "would be subject to its compliance with the conditions laid down by general international law for such an act and the joint statement and guidelines of 16 December 1991".[127]

Relevance of European Conditions in the Quebec Context

The first two of the five conditions set by the European Community are of possible relevance in recognition of a new state of Quebec.

The first condition, on human rights generally, provides that states asking for recognition must make a commitment to respect the human rights provisions of three international instruments: the Charter of the United Nations, the Final Act of Helsinki and the Charter of Paris. The human rights provisions of the United Nations Charter are general in nature and are universally known. The Final Act of Helsinki, adopted in 1975, provides that signatory states agree to respect and promote the effective exercise of the most fundamental human rights. This obligation is tempered considerably, however, by two principles pertaining to the sovereignty of states: political independence and non-intervention in the internal or external affairs of states. The Charter of Paris for a new Europe was adopted by participating states in the Conference on Security and Co-operation in Europe (CSCE) in November 1990. Those states made specific commitments to respect human rights, democratic principles and the rule of law.

The second condition, on ethnic and minority rights, provides for guarantees for national minorities in accordance with the commitments subscribed to within the framework of the CSCE. Those commitments are contained in the Document of the Copenhagen Meeting of the Conference on the Human Dimension, adopted in June 1990. The document has three pages of provisions pertaining to the rights of

national minorities.[128] These provisions relate to minority rights with respect to education, culture, language, religion, and participation in public affairs.

Guarantees for the respect of human rights do not constitute an additional criterion for statehood. However, the importance of obtaining such guarantees may be very real if it creates in the minds of the protected people an expectation of intervention should the guarantees not be respected. With growing internationalization of human rights, such an intervention might well be considered legally justifiable, depending on the degree of abuse.

This discussion on the possible relevance of certain conditions was in the context of recognition by individual states, but recognition can also be accorded collectively.

Collective Recognition

With the advent of the United Nations, individual recognition of states has lost much of its former importance; to a large extent, recognition has become a collective act through admission to membership in the United Nations. In such a case, recognition might be imposed, in a sense, on a dissenting minority that has voted against admitting the new state. For instance, when the new state of Israel was admitted in 1949, Arab states continued to refuse their individual recognition, but this did not prevent Israel from being a full member of the United Nations and of the international community, having been recognized as such by the great majority of states. The possibility of imposing conditions for admission to the United Nations and other international organizations is discussed in PART IV of this study (page 81).

The Role of Recognition Applied to a Seceding Quebec

In case of secession by Quebec, individual recognition by Canada and by other states could play an important role, particularly at the beginning of the new state's existence.

Recognition of Quebec by Canada

If secession of Quebec comes about by a unilateral declaration of independence, the government of Canada could and should insist on obtaining specific guarantees with respect to the protection of Indigenous peoples, as well as ethnic and national minorities. Canada could also insist that any remaining question relating to state secession be resolved by agreement or arbitration.

The question of guarantees of indigenous rights is, of course, most important. The present constitutional guarantees, under section 35 of the *Constitution Act, 1982*, would cease to exist after independence unless the new Quebec constitution incorporated them. In these circumstances, some Indigenous peoples maintain that any change in Quebec's political status requires their consent, in so far as their rights could be affected.[129] Certainly, their consent would be necessary to make any change in the rights guaranteed by the provisions of the James Bay and Northern Quebec Agreement, since they are parties to it.

To obtain the necessary guarantees, Canada could give Quebec at least two options: accept the present fiduciary obligations of Canada, or redefine its relationship with Indigenous peoples in concert with them. These are the two options envisaged by the draft report of the Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté.[130] These two options might not be very satisfactory to either Canada or Indigenous peoples. The first, which is basically the status quo, is contested by Indigenous peoples, at least in its implementation. The second, a redefined relationship, provides no real

guarantee to Indigenous peoples, since it has to be negotiated and agreed upon.

It is suggested that a third, and a preferable, option would be a combination of the first two. It would have two components: first, passage of a law by the Quebec National Assembly, formally accepting the fiduciary obligations of Canada as interpreted by the courts; and second, negotiation and conclusion of a treaty (used here in the sense of an 'Indian treaty', that is, an agreement of a sacred nature) with Indigenous peoples, outlining the parameters of their self-government. There could well be one general framework treaty, containing the general parameters of self-government, and several special treaties, specifying the parameters in more detail, with the individual peoples concerned. A similar framework agreement was signed on 7 December 1994 between the Assembly of Manitoba Chiefs and the federal minister of Indian affairs.[131]

Recognition of Quebec by Other States

In the event of Quebec's accession to sovereignty, its recognition by other states would be influenced considerably by the attitude of Canada. If Quebec succeeds in obtaining Canada's recognition, other states should normally follow with their own recognition without much problem. However, it might well be delicate for other states to accord recognition to a new state of Quebec before Canada does so, since this gesture could affect or compromise other states' relations with Canada. Certainly, recognition by the United States would be influenced strongly by recognition or non-recognition on Canada's part. If Canada makes its recognition subject to certain conditions, the United States and other countries could decide to do the same.

Conclusions

What follows are the main conclusions arising from the preceding analysis.

1. A state exists when it meets the basic criteria (a fixed territory, a population and an effective government), but it must be recognized by other states in order to exercise its rights of statehood.
2. Recognition by individual states is a political and discretionary act; therefore, conditions for recognition can be imposed.
3. Individual recognition has lost some of its importance, with the advent of collective recognition through admission to the United Nations (see PART IV of this study, beginning on page 81).
4. Canada could make its recognition subject to conditions, such as (1) the formal acceptance of Canada's fiduciary obligation to Indigenous peoples through an act of the Quebec National Assembly (or, preferably, a special provision in its constitution); and (2) the conclusion of a framework agreement between Quebec and Indigenous peoples, guaranteeing their right of self-government and other related rights.
5. Other states also could make their individual recognition of a new state of Quebec subject to conditions similar to those imposed by Canada.

Part IV
Canada's Fiduciary Obligation to Indigenous Peoples in Quebec and Admission of Quebec to International Organizations

by Donat Pharand

To explain the context for admission of a new state of Quebec to international organizations, this part begins with a very brief review of Quebec's present and proposed future involvement in international relations. It goes on to examine the conditions for admission to the United Nations and other international organizations, to determine whether Quebec's admission could be made conditional on obtaining a commitment to respect the fiduciary obligation to Indigenous peoples.

Involvement of Quebec in International Relations

Present Involvement as a Province

Although Quebec had delegations in Paris and London before 1967, it was not until then that a provincial department of international relations was formally established.[132] One of the main purposes of the department is to encourage the cultural, economic and social development of Quebec by establishing international relations, under the responsibility of a separate minister. By 1989, the department employed more than 500 people, over and above the staff in Quebec's delegations abroad. At the same time, the number of Quebec 'representatives' abroad was as follows: 85 in the United States, 74 in France, 85 in Europe generally, 50 in Asia, and 54 in Latin America. Also by 1989, Quebec had entered into a total of 230 international accords or *ententes*, of which 25 per cent were with U.S. states, 21 per cent with African governments, 16.5 per cent with European governments excluding France, 16.5 per cent with France itself, and 10 per cent with Latin

American states.[133] During that same period, there was also a corresponding increase in the number of visits abroad by Quebec ministers.

Future Involvement as a State

The Parti québécois devotes three pages to international relations in its party platform.[134] It states that its first step will be a request for admission to the United Nations, followed by similar requests to the major specialized agencies of the United Nations; those mentioned are UNESCO, WHO, ILO, FAO and ICAO. The platform specifies that Quebec will also ask for admission to GATT, the World Bank, the IMF and the OECD. It will, of course, participate in the Agency of Cultural and Technological Co-operation of Francophone Countries ('La Francophonie'). Quebec is already active in that organization as a 'participating government', but not as a member state. The party platform also states that Quebec envisages participation in the Commonwealth and membership in the OAS and the CSCE, as well as the FTA and NAFTA.[135] Mention is also made of intensifying Quebec's commercial relations with France and the United States, particularly the latter.

In addition, the draft bill on sovereignty, tabled in the National Assembly on 7 December 1994, states that "Quebec shall take the necessary steps to remain a member" of NATO and NORAD.[136]

Admission of Quebec to International Organizations

Admission to the United Nations

The conditions for admission to the United Nations are specified in article 4, paragraph 1 of its charter, which reads as follows:

> Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the

present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations.

As for the procedure to be followed, two steps are necessary: a recommendation by the Security Council and a decision by the General Assembly. Admission being an important question, its recommendation requires the affirmative vote of all five permanent members of the Security Council. However, under a well established practice going back to 1949, when Israel was admitted, a permanent member's abstention from the vote is not considered a veto. At least 25 other states have also benefited from a favourable recommendation on the part of the Security Council, despite the abstention of one of the permanent members.

With respect to the substantive conditions enumerated in paragraph 1, the question that arises is whether it is possible to add a condition that is not mentioned specifically in the United Nations Charter. This question did arise in 1948, when the Soviet Union was opposing the admission of certain states supported by the United States and the latter was opposing the admission of states proposed by the Soviet Union. The Soviet Union declared itself ready not to oppose the candidacy of Italy, which was supported by the United States, if the other members of the Security Council did not oppose admission of Hungary, Romania, Bulgaria and Finland. In these circumstances, the International Court of Justice was asked for an advisory opinion on whether it was legally possible for a United Nations member to make its consent to the admission of a state dependent on conditions not provided for expressly by paragraph 1 of the charter. The court answered the question in the negative:

> The requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so.[137]

The court added that it was not possible to argue that "the conditions enumerated represent only an indispensable minimum, in the sense that political consideration could be superimposed upon them, and prevent the admission of an applicant which fulfils them".

In a second opinion in 1950, the court held that the Security Council could not be circumvented and that its recommendation was a condition precedent for the General Assembly to make a decision to admit a state as a member.[138]

These limitations did not prevent the permanent members of the Security Council from agreeing on a package deal in 1955, when 16 states were admitted as a block, including candidates previously supported and opposed by the two superpowers. In the circumstances just described, the United Nations has never imposed, as a condition of admission, respect for human rights covered by specific international instruments, such as the documents of the CSCE or the Treaty of Paris on the rights of minority groups. Of course, one of the conditions mentioned in article 4 is that the new member accepts the obligations contained in the United Nations Charter, one of which is "to take joint and separate action with the Organization" to promote universal respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion.[139] In addition, the new member must be judged able and willing to carry out these obligations.

In practice, it does not appear that much time is devoted to determining this willingness and ability. For instance, this was the case when the republics of the former Yugoslavia were admitted in 1992 and 1993. There seems to be a presumption that new states will, indeed, respect their obligations in this regard. If the member state does not, the General Assembly may decide to suspend the member by excluding it from participation in the work of the Assembly. This was done in 1976, with respect to the Union of South Africa, because of its apartheid

policy. A similar decision was taken by the General Assembly in 1992 with respect to the Federal Republic of Yugoslavia (Serbia and Montenegro), preventing it from participating in the work of the Assembly and requesting it to apply for membership as a new state.

This review makes it clear that any request for admission on the part of an independent Quebec would not likely be subject to a prior commitment that it would respect the fiduciary obligation to Indigenous peoples. However, as a United Nations member, Quebec would be legally bound by the human rights provisions of the United Nations Charter already referred to.

Admission to Specialized United Nations Agencies

The constitutions and practice of United Nations specialized agencies make it fairly easy for states to become members, particularly if they already belong to the United Nations itself. What follows is a brief review of the conditions for admission to UNESCO, the World Health Organization (WHO), the Food and Agriculture Organization (FAO), the International Civil Aviation Organization (ICAO), and the International Labour Organisation (ILO).

UNESCO

Its constitution provides that United Nations membership carries with it the right to membership in UNESCO, which explains why its membership is virtually the same as that of the United Nations.

WHO

United Nations members that subscribe to WHO's constitution are automatically members, and non-United Nations states can also be admitted by a simple majority vote of the Assembly.

FAO

States must accept the FAO constitution, and they are admitted on a two-thirds majority vote of the Conference.

ICAO

A new state can become a member by acceding to the Chicago Convention of 1944 and by accepting the obligations contained in that convention.

ILO

United Nations members can join the ILO by formally accepting the obligations contained in its constitution. Membership is also open to other states on a two-thirds vote of delegates at a Conference session.

Although all of these specialized agencies have an important human rights component, no special importance seems to be attached to it at the time of application for membership, and certainly not to the point of making human rights guarantees a condition for admission. It would be understandable, for instance, that since a basic purpose of the ILO is to improve working and living conditions through its conventions and recommendations, a new state would be required to make a certain commitment in this regard at the time of entry. However, such is not the case. Perhaps the reasoning is that it is better to make membership as universal as possible and to exercise influence in favour of human rights by persuasion after a new state has become a member.

Admission to Certain Economic Organizations

With the globalization of markets and the consequent liberalization of international capital flows, a sovereign Quebec would need and want to benefit from membership in the leading economic organizations. The conditions of admission to the following organizations are summarized

here: the International Monetary Fund (IMF), the World Bank, the Organisation for Economic Co-operation and Development (OECD), the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO), the Free Trade Agreement (FTA), and the North American Free Trade Agreement (NAFTA).

IMF

This organization is open to all states willing to accept its obligations. Membership is obtained by ratification of its articles and acceptance of the conditions established by the board of governors.

World Bank

Membership in the World Bank Group is restricted to members of the IMF, and states must ratify the articles of the Bank, as well as accept the terms laid down by the Bank.

OECD

Although the OECD originated as a strictly regional European organization, it now includes the United States, Canada and Mexico. A unanimous decision on the part of members is necessary for the admission of new states. Naturally, it would add to Quebec's prestige and credibility on the international scene to become a member of the OECD.

GATT/WTO

Under article 33 of the GATT, accession by a new state is made on terms to be agreed upon by the contracting parties, which means a decision by a two-thirds majority. The protocol of accession is then ratified by the new state before it can become a member. Since 1993, when the Russian Federation applied, a working party is established,

when a state applies for membership, to negotiate the terms of the protocol. The working party then makes a report, which is presented to the Council of GATT for discussion and adoption. For instance, Slovenia became the 124th member of GATT on 30 October 1994, after the terms of the protocol of accession were negotiated in a working party. Its request for admission to the WTO is now being examined by the working party.

FTA

This free trade association being based on a bilateral treaty between Canada and the United States, a new state can become a member only with the consent of the existing parties. Membership in the FTA could pose a major policy decision for both Canada and the United States. It would seem that an agreement establishing an economic association between Canada and Quebec could greatly facilitate Quebec's admission to the FTA and probably to NAFTA as well. Also, Canada could withhold its consent until it was satisfied that Quebec would respect the fiduciary obligation to Indigenous peoples.

NAFTA

This free trade association between the United States, Mexico and Canada, concluded in December 1992, came into force on 1 January 1994. The agreement provides that "[a]ny country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed upon between such country or countries and the Commission".[140] "The Commission" is the Free Trade Commission, which supervises implementation of the agreement. The agreement specifies further that all existing parties must consent to the accession of a new state. It provides that "[t]his Agreement shall not apply as between any Party and any acceding country or countries if, at the time

of accession, either does not consent to such application".[141] Pursuant to this provision, it was decided at the December 1994 Summit on the Americas to begin negotiations aimed at making Chile the fourth member on 1 January 1996.[142] This requirement for the consent of all existing parties to the accession of a new one in the case of a treaty between a small number of states is in conformity with a well established rule of treaty law.[143]

It is important to note that NAFTA contains special provisions for the protection of Indigenous peoples in each country that is a party to the agreement. The protection relates to the cross-border services and investment provisions of the agreement. Canada's schedule stipulates that "Canada reserves the right to adopt or maintain any measure denying investors or another Party and their investments, or service providers of another Party, *any right or preferences provided to aboriginal peoples*".[144] The schedule also refers to "Existing Measures" in the Constitution of 1982. The schedules of the other parties contain similar provisions. In the case of Mexico, the schedule refers to "disadvantaged groups", and for the United States, it refers to "socially or economically disadvantaged minorities".[145]

Although these economic and financial organizations could conceivably insist on obtaining guarantees from a sovereign Quebec with respect to its treatment of Indigenous peoples and national minority groups, the human rights component of their activities is not a priority. As for the FTA and NAFTA, however, there is no doubt that Canada could make its consent to Quebec's entry as a new partner conditional upon obtaining such guarantees.

Admission to the CSCE

The Conference on Security and Co-operation in Europe (CSCE), established in 1975, has developed a very important human rights aspect

to its activities over the years. Although the principles of state sovereignty and non-intervention were very much in evidence initially, it is now clear that the contest between sovereignty and human rights is being won by the latter. This was particularly evident at the two conferences held in 1990: one held in June in Copenhagen, on the human dimension, the other in Paris, in November. The Charter of Paris made the protection and promotion of human rights "the first responsibility of government".[146]

Even more significant was the Helsinki Summit of 1992, where the CSCE took a number of decisions to strengthen its institutions and structures, in particular to appoint a High Commissioner on National Minorities. That decision states that the High Commissioner will provide "early warning" and, as appropriate, "early action" in regard to tensions involving national minority issues that could develop into conflict and affect peace, stability and relations between the participating states.[147]

The Conference now includes some 54 states, one of which is Canada. Although the CSCE was not established on the basis of a constitution and has no formal conditions for admission as a participating state, it introduced an interesting practice in 1992, when Albania asked to become a member. Since then, requesting states have been asked to subscribe to the Helsinki Final Act, the Charter of Paris and the other instruments adopted by the Conference. In addition, and perhaps even more important, the requesting state must allow observers named by the CSCE to visit the country and make a report on the human rights situation.

In these circumstances, a new state of Quebec could well be asked to subscribe to the human rights obligations of the CSCE and to consent to a visit and report by a group of observers.

Admission to NATO and NORAD

Consent of all parties is necessary for accession to both the North Atlantic Treaty Organization and the North American Aerospace Defence Command.

The North Atlantic Treaty of 1949 provides that the "Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty."[148] The treaty envisages new members from Europe only because, of course, the only two independent countries in the North Atlantic region outside of Europe (the United States and Canada) were original parties. This geographic condition poses no problem, however, since all the territory of Quebec was part of Canada in 1949.

As for contributing to the security of the region, the mere fact that a state is in the geographic region concerned makes it desirable that it be a member. Whether parties to the treaty would take into account Quebec's treatment of Indigenous peoples in deciding whether to extend a membership invitation is an open question.

As for NORAD, the consent of the parties (the United States and Canada) is an absolute prerequisite, this being a bilateral treaty. Here again, the geographic location of Quebec makes it desirable for it to be a party. But either party could, at least theoretically, attach whatever condition it wishes to its consent.

Admission to the Organization of American States

Membership in the Latin American organization has found favour in French Canada, going back to the Lima Conference of the Panamerican Union of 1938.[149] It is not surprising, therefore, that the Parti québécois platform envisages membership in the Organization of American States (OAS). The constitution of the OAS provides that

"membership in the Organization shall be confined to independent States of the Hemisphere that were members of the United Nations as of December 10, 1985...".[150] The request for admission must be addressed to the Secretary General, and the applicant state must declare that "it is willing to sign and ratify the Charter of the Organization and to accept all the obligations inherent in membership, especially those relating to collective security expressly set forth in Articles 27 and 28 of the Charter".[151] Article 28, relating to the obligation to apply measures set out in the Rio Treaty, has been ignored in practice for nearly 30 years by allowing states to become members without being parties to the Rio Treaty. Consequently, it is now possible to become a member of the OAS by simply acceding to the Charter of Bogota.[152] This is how Canada became a full member, after being an observer for more than 15 years.

There is no obvious reason to believe that a new state of Quebec could not be admitted to the OAS in the manner just described. Moreover, there is nothing in the Charter of Bogota relating to the observance and promotion of human rights. It is true that, in theory, Latin America has developed a fairly sophisticated regional system to promote and protect human rights, but in practice, it is another matter. Somewhat similar to the European system, the OAS has both a commission and a court of human rights, and it provides for individual complaints. As part of its practice, the Inter-American Commission on Human Rights asked Canada as a new member to prepare a report on its protection of human rights. Canada did so in February 1992, outlining the constitutional protections, the legislation and machinery, and educational and race relations programs, as well as intergovernmental and international co-operation in matters of human rights.[153] Presumably, this report was not a condition for Canada's entry to the

OAS and, if not, it would not likely be made a condition for the admission of a new state of Quebec.

Conclusions

It is possible to extract certain conclusions from the preceding analysis relating to admission of a sovereign Quebec to international organizations.

1. Admission to the United Nations requires five conditions to be met by the applicant, and these conditions are exhaustive (I.C.J. Advisory Opinions, 1948 and 1950). One of the conditions is acceptance of the obligations in the Charter of the United Nations, in particular to take action to achieve universal respect for human rights.
2. No additional condition can be added formally, but nothing prevents states from taking other matters into account when casting a vote in either the Security Council or the General Assembly. Such matters could include the attitude of the applicant state toward Indigenous peoples living within its boundaries.
3. Although specialized agencies and economic organizations could conceivably make admission conditional on the respect for certain human rights, this is not done in practice.
4. Admission to the FTA can be effected only with the consent of both parties, since it is a bilateral treaty, and Canada could withhold its consent until it was satisfied that Quebec would respect the fiduciary obligation to Indigenous peoples.
5. Admission to NAFTA can occur only with the consent of all existing parties (article 2204), and here as well, Canada could make its consent conditional upon obtaining adequate guarantees from Quebec in relation to Indigenous peoples.

6. The CSCE has no formal constitution, but its practice on admissions since 1992 requires applicant states to subscribe to the CSCE's main instruments. Moreover, a new state applying for admission must allow CSCE observers to visit the country and report on the human rights situation.

7. Admission to the two defence alliances, NATO and NORAD, requires the consent of all parties; respect for human rights or the treatment of Aboriginal peoples is not mentioned.

8. Admission to the OAS is not subject to respect for human rights, either under the Charter of Bogota or in practice.

Part V
Conclusions on Canada's Fiduciary Obligations to Aboriginal Peoples in Quebec under International Law

General Conclusions

1. As a matter of international law, the government of Canada has a duty to protect the rights of Aboriginal peoples subject to its jurisdiction. Although international law uses various terminology to describe this duty, it is equated in this report with 'fiduciary obligations'.
2. In the world community, 'Aboriginal peoples' are generally identified by a variety of names, especially 'Indigenous peoples'. In this report the Canadian usage is preferred, but it embraces developments pertaining to other equivalent identifications.
3. The rights of Aboriginal peoples under international law have been evolving rapidly in recent years, reflecting the outcome of the decolonization process, the development of international legal protection of human rights and vulnerable peoples, and the activism of Aboriginal peoples on a global level. Canada has been generally supportive of this expansion of rights enjoyed by Aboriginal peoples.
4. In principal formulations of international law, the approach taken has shifted from one of assimilationism in Convention No. 107 (1957) of the International Labour Organisation to one of respect for autonomy and rights of self-administration in the ILO's Convention No. 169 (1989). The latter text refrains from affirming a right of self-determination for Aboriginal peoples, although such a right is the centrepiece of the Draft Declaration

on the Rights of Indigenous Peoples currently under consideration within the United Nations system.

5. Canada has not ratified Convention No. 169 as yet, although it was an active and supportive participant in the negotiations leading to its adoption. Many scholars now agree that much of Convention No. 169 is declaratory of existing or emergent customary international law, thereby forming a part of Canada's fiduciary obligation to Aboriginal peoples.

Conclusions Pertaining to the Right of Self-Determination

6. The Aboriginal peoples of Quebec are peoples that enjoy the right of self-determination, although the full significance of this right has yet to be fixed firmly in international law.

7. An uncontested dimension of this right of self-determination is that of timely and full participation in any developments that affect Aboriginal peoples' political, economic, and cultural arrangements associated with current levels of self-government and autonomy as entrenched in Canadian constitutional law and by way of international law.

8. The prospect of Quebec's accession to sovereignty and any negotiations associated with this process definitely present an occasion that gives rise to justifiable demands for timely and full participation by Aboriginal peoples.

9. It is part of the fiduciary responsibility of the government of Canada to ensure that the modalities of such participation fulfil the requirements of international law and to put forward for negotiation reasonable interpretations of its applicability, and to do so after genuine and comprehensive consultation with representatives of the affected Aboriginal peoples; the right of participation would seem to encompass setting up a framework

for participation that is sensitive to the differing orientations and aspirations of the various Aboriginal peoples affected.

10. Of particular importance is a procedure for resolving objections to changes in affiliation put forward on behalf of Aboriginal peoples that could not be resolved by negotiations; presumably, submitting such objections to a mutually agreed upon arbitral mechanism that operates within a framework that includes respect for the relevant standards and principles of international law, taking due account of recently emergent customary international law, which has been increasingly responsive to the main claims of Aboriginal peoples.

11. By virtue of settled Canadian law, customary rules of international law are applied automatically within Canada by courts and other governmental institutions, provided such rules do not conflict directly with Canadian legislation or appear to encroach upon constitutional norms contained in the Constitution of Canada.

12. It is important to acknowledge that there are no relevant precedents and that the general principles to be applied do not by themselves resolve the inconsistent claims, based on varying interpretations of the right of self-determination, that would likely be put forward by the government of Quebec following a democratic referendum and by representatives of Aboriginal peoples. Given this evolving set of circumstances, the government of Canada would need to accept responsibility for providing guidelines for protecting the rights and well-being of the various Aboriginal nations, on the basis of consultation with their leaders, that would pertain to whatever overall adjustments were made. This discharge of responsibility should take full account of Aboriginal peoples' past experience of vulnerability

and abuse. The recognition of their right of self-determination, which implies neither a right of nor an intention to seek independence, would offer clear evidence of Canada's fulfilment of its duties under international law. In any event, the government of Canada has the opportunity to create a constructive precedent by the manner in which it addresses Aboriginal peoples' rights in the context of the future relationship between Quebec and Canada. If the referendum in Quebec should happen to favour separation in some form, then a unique occasion would arise calling for specification of the right of self-determination in the distinctive setting of secession juxtaposed against the rights of Aboriginal peoples.

13. The history and experience of Aboriginal peoples resembles that of colonial peoples in most crucial respects, and international law is moving toward more extensive and formal acknowledgement of this status, at least implicitly, in the context of the Draft Declaration of the Rights of Indigenous Peoples.

14. In the event that the dynamics of accession to sovereignty are not controlled by negotiations and by respect for minimum standards of international law, then both the participatory and the substantive rights of Aboriginal peoples would have been denied, and recourse to more drastic claims of independence or reaffiliation with Canada on the part of Aboriginal peoples would seem validated by the emergent right of self-determination enjoyed by such peoples. One unfortunate consequence of treating secession as a matter of fact, not law, is to foster the belief that only by force – that is, by creating facts on the ground – can the *results* of self-determination be achieved, since the *right* to reach such results is being resisted so strenuously.

Conclusions on Fiduciary Obligation and Recognition of Quebec

15. A state exists when it meets the basic criteria (a fixed territory, a population and an effective government), but it must be recognized by other states in order to exercise its rights of statehood.

16. Recognition by individual states is a political and discretionary act; therefore, conditions for recognition can be imposed.

17. Individual recognition has lost some of its importance with the advent of collective recognition through admission to membership in the United Nations.

18. Canada could make its recognition of an independent Quebec subject to conditions, such as (a) the formal acceptance of its fiduciary obligation by an act of the Quebec National Assembly (or, preferably, a special provision in its constitution), and (b) the conclusion of a framework agreement between Quebec and Aboriginal peoples, guaranteeing their right of self-government and other related rights.

19. Other states could also make their individual recognition subject to conditions similar to those imposed by Canada.

Conclusions on Quebec's Admission to International Organizations

20. Admission to the United Nations requires five conditions to be met by the applicant, and those conditions are exhaustive. One of those conditions is acceptance of the obligations in the United Nations Charter, in particular to take action to achieve universal respect for human rights.

21. No additional condition can be added formally, but nothing prevents states from taking other matters into account when casting a vote in the Security Council or the General Assembly.

Such matters could include the attitude of the applicant state toward Indigenous peoples living within its boundaries.

22. Although specialized agencies and economic organizations could conceivably make admission conditional on respect for certain human rights, this is not done in practice.

23. Admission to the Free Trade Association can be effected only with the consent of both parties (since it is a bilateral treaty), and Canada could withhold its consent until it was satisfied that Quebec would respect the fiduciary obligation to Indigenous peoples.

24. Admission to NAFTA can occur only with the consent of all existing parties, and here as well, Canada could make its consent conditional upon obtaining adequate guarantees from Quebec with respect to Indigenous peoples.

25. The Conference on Security and Co-operation in Europe (CSCE) has no formal constitution, but its practice on admissions since 1992 has been to require applicant states to subscribe to the CSCE's main instruments. Moreover, a new state applying for admission must allow CSCE observers to visit the country and report on the human rights situation.

26. Admission to the two defence alliances, NATO and NORAD, requires the consent of all parties; respect for human rights and the treatment of Aboriginal peoples are not mentioned.

27. Admission to the Organization of American States (OAS) is not subject to respect for human rights, either under the Charter of Bogota or in practice.

Annex I
Canada's Fiduciary Obligation and Quebec's Succession to Canada's Rights and Duties in Case of Secession

by Donat Pharand

Introductory Comments on State Succession

The question of state succession, although very old, has remained a most complex and somewhat uncertain part of international law. State succession covers two main areas: state property, archives and debts; and treaties. The International Law Commission has attempted to bring more certainty into state succession by preparing draft articles as a basis for two conventions: the Vienna Convention on Succession of States in respect of treaties, adopted in August 1978, and the Vienna Convention on Succession of States in respect of state property, archives and debts, adopted in April 1983.

These conventions have not yet received the number of ratifications necessary to bring them into force. Nevertheless, states look upon them as a source of inspiration for the principles of international law governing state succession. For instance, in 1992, the Arbitration Commission established by the European Community stated that "[t]he phenomenon of State succession is governed by the principles of international law, from which the Vienna Conventions of August 23, 1978 and April 8, 1983 have drawn inspiration".[154]

In the present instance, we are concerned only with the Convention on Succession of States in respect of treaties. The preamble of the convention specifies, however, that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". In addition, the convention

specifies that "the fact that a treaty is not considered to be in force in respect of a State...shall not in any way impair the duty of that State to fulfil any obligation embodied in the treaty to which it is subject *under international law independently of the treaty*".[155] This provision makes it clear that there is a body of international law principles that are applicable independently of treaties.

The body of law includes principles of customary international law, some of which could be peremptory norms "from which no derogation is permitted".[156] For instance, the Arbitration Commission on Yugoslavia was of the opinion that "the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession".[157]

In these circumstances, this annex examines two sources of law with respect to the succession of rights and duties that might devolve on Quebec as a successor state to Canada: (1) the provisions of the Vienna convention on state succession with respect to treaties; and (2) customary international law.

Succession of Quebec under Provisions of the Vienna Convention

The uncertainty of customary international law at the time the convention was prepared and adopted is reflected in its provisions. Some of them are based on the view that a new state starts with a clean slate and is not bound by treaties of its predecessor, while other provisions are based on the view that there is a continuity of treaties for the successor state. To understand the principles incorporated in the convention, it is necessary to examine briefly the meaning of these opposing doctrines and determine the basis of the main provisions.

Two Opposing Doctrines: Continuity versus Clean Slate

The opinion of writers and the practice of states reflect two opposite approaches or doctrines. Under the continuity doctrine, the successor state, usually a former colony, would continue to be bound by the treaties concluded by the predecessor state, usually the colonial power. Certainly, this was the rule followed before the Second World War by the older British dominions such as Canada. Since the Second World War, particularly with the intensity of the independence movement in the 1960s, the clean slate doctrine has generally been followed. On the basis of the right of self-determination and the principle of equality of sovereign states, new states wanted to begin with a clean slate. They wanted to have the choice of accepting or rejecting treaties concluded by their former masters of foreign relations. This view became the prevailing rule in matters of state succession relating to treaties, with the exception of boundary and territorial treaties, creating dispositive or real (territorial) situations as opposed to establishing personal relationships.

At the time the International Law Commission prepared the draft articles in 1974, the state of the law was summed up by the Special Rapporteur, Sir Francis Vallat. After analyzing the comments of governments on the draft articles, he described the legal situation:

> ...it cannot be said with confidence that there is an established and generally accepted rule of customary international law that a newly independent State is in general free from obligation in respect of its predecessor's treaties. Nevertheless, the tendency of modern practice and doctrine has been in that direction, and *the clean slate metaphor as understood and applied by the Commission is more in accordance with than contrary to that practice and doctrine.* Moreover, overwhelming support for the clean slate doctrine has been expressed by Member States.[158]

The predominant opinion and state practice favouring the clean slate, the Special Rapporteur proposed to the Commission that it should

complete preparation of the draft articles on the basis of that doctrine. This suggestion was followed, subject to the traditional exceptions relating to boundary and territorial treaties. In 1978, however, the conference of states added other exceptions at the time it adopted the convention. The result is that there is no general agreement on which provisions merely codify customary international law and which represent a new development.

This uncertain situation will remain until such time as one of two things happens. The first would be the ratifications or accessions by 15 states necessary for the convention's entry into force. The second would occur with the simple passage of time and general acceptance of the provisions of the convention in the practice of states, thus resulting in principles of customary international law.

Clean Slate Rule, with Exceptions

The clean slate rule was retained, in principle, for the succession of states in two situations: the case of newly independent states, and the incorporation of one state by another. Before reviewing the relevant provisions, it is important to understand the meaning given by the convention to the two key expressions 'succession of states' and 'newly independent states'.

As defined in the convention, 'succession of states' means "the replacement of one State by another in the responsibility for the international relations of territory". The replacement can be total or partial. It is total when the new state was a colony or a protected state. It is partial when only part of the territory of a state is incorporated into another.

'Newly independent state' means "a successor State the territory of which immediately before the date of the succession of States was a dependent territory, for the international relations of which the

predecessor State was responsible". The term 'dependent territory' refers to a colony, a territory under mandate or trusteeship, a protectorate, or any non-self-governing territory.

Newly independent states

The clean slate rule adopted for newly independent states, as defined in the convention, is expressed as follows:

> A newly independent State is not bound to maintain in force, or to become party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates. (article 16)

The convention specifies how this general rule should be applied to multilateral treaties and to bilateral ones. For multilateral treaties, the newly independent state may opt for continuity by giving a written notification of succession with respect to treaties in force on its territory at the time of independence. However, this option does not apply in two cases: first, if the application of a treaty to the newly independent state would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation; and second, if consent of the other parties is required either under the terms of the treaty or by reason of the limited number of parties (article 17, paragraphs 2 and 3).

For bilateral treaties, both parties must give their consent either expressly or by their conduct before the newly independent state can be accepted as a party.

Incorporation of a state

When part of the territory of a state becomes part of the territory of another state, there is a change in treaty regime. This happened in 1949, when treaties applicable to Newfoundland (for which Great Britain was

responsible in its international relations) were replaced by those of Canada. This is normally referred to as the 'moving treaty frontier rule'. The rule would not obtain, however, if to apply a treaty to the incorporated territory would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation (article 15). Also, the new treaty regime would be subject to any territorial treaty, such as a long-term lease to another state. This was the case for the territory of Newfoundland, which was subject to a 99-year lend-lease from Great Britain to the United States to operate a naval base.[159]

Continuity Rule, with Exceptions

The convention provides for the application of the continuity rule in three cases: when there are boundary or territorial treaties in force; when two states unite together; and when there is separation of part of a state or secession.

Boundary and territorial treaties

The convention merely confirms an established rule that dispositive or real treaties continue to apply, despite a succession of states. A treaty that establishes a boundary or boundary regime is not affected by a succession of states (article 11). This is in conformity with a rule incorporated in the Vienna Convention on the Law of Treaties of 1969, which provides that not even a fundamental change of circumstances can be invoked for terminating or withdrawing from a treaty that establishes a boundary (article 62).

The same rule of continuity applies to other territorial regimes, that is, relating to the use of any territory or restrictions on that use (article 12). For instance, treaties relating to rights of transit over the territory, to certain water rights, or to navigation on rivers are

considered to provide for objective regimes and continue to apply. However, the convention specifically excludes treaties referring to foreign military bases, such as the U.S. naval base in Newfoundland at the time of its incorporation into Canada in 1949. Canada accepted the continuation of the base at that time, but it is possible that it did so voluntarily and not because of an obligation.

Uniting of states

The convention provides for the application of the continuity rule when two or more states unite and form one successor state. Any treaty in force at that time, in respect of any of the uniting states, continues to be in force for the united successor state. This rule applies unless the states agree otherwise or the application of a treaty would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation (article 32).

Separation of part of a state: secession

Since the continuity rule represents something of a change, it is useful to determine what rule was previously applicable in a case of secession. More specifically, the rule in the convention might not be considered to have become part of customary international law through state practice since 1978 and, if so, the former rule might still be applicable.

The traditional rule in customary international law applicable to the birth of a new state through secession was examined by Lord McNair in his authoritative treatise, *The Law of Treaties*, in 1961. Lord McNair summarized his opinion in the following paragraph:

> In spite of some evidence to the contrary, emanating mainly from diplomatic rather than legal sources, it is submitted that the *general principle is that newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a*

> *clean slate in the matter of treaty obligations*, save in so far as obligations may be accepted by them in return for the grant of recognition to them or for other reasons, and except as regards the purely local or 'real' obligations of the State formerly exercising sovereignty over the territory of the new State.[160]

Aside from examining the case of the North American colonies that became the United States and a number of other cases, Lord McNair cites another well known authority, D.P. O'Connell, who "has examined secession in considerable detail and concludes that there is a balance of opinion in favour of the view that *the new State starts with a clean slate as regards 'personal treaties'*".[161]

In the same way, the Special Rapporteur, Sir Humphrey Waldock, concluded in 1972 that "the practice prior to the United Nations era, if there may be one or two inconsistencies, provides *strong support for the 'clean slate' rule* in cases of 'secession'...". Sir Humphrey specifies later in his report that

> The available evidence of practice does not therefore support the thesis that *in the case of a dismemberment of a State*, as distinct from the dissolution of a union of States, treaties continue in force *ipso jure* in respect of the separated territory. On the contrary, *the evidence strongly indicates that any such territory which becomes a sovereign State is to be regarded as newly independent State...*[162]

The opinion of the International Law Commission was confirmed by the comments received from governments on its draft articles. In 1974 the Special Rapporteur, Sir Francis Vallat, summarized the comments of governments as follows:

> a number of comments suggest in effect that a *new State resulting from separation should be treated as a "newly independent State*". The comments of the French and Belgian delegations, and the United Kingdom and United States Governments, are in that sense.[163]

Despite all the evidence pointing to a customary rule of international law equating seceding states with newly independent states

and enabling them to start with a clean slate, the conference of states decided to replace the draft article recommended by the International Law Commission with one incorporating the continuity rule. The applicable rule in the convention is as follows:

> When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
> (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect to each successor State so formed;
> (b) *any treaty in force* at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State *continues in force in respect of that successor State* alone.[164]

According to this new provision, any treaty applicable to the entire territory of the predecessor state continues to be in force for any successor state after secession. The provision envisages two situations: first, where the entire territory of the predecessor state is separated and allotted to numerous successor states, as in the case of Yugoslavia; second, where only part of the territory of the predecessor state is separated and becomes the territory of a single successor state, as would be the case if Quebec seceded.

Only two exceptions to this rule are provided for in the convention: first, if the states concerned agree on another rule; second, if the application of a treaty would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation.[165]

The question that arises immediately is why the conference rejected the clean slate rule for seceding states and accepted it for newly independent states, in the sense of former colonies or protected states. In the opinion of Maurice Arbour, who has analyzed the debates at the conference, it is clear that the conference

> preferred political reasoning to legal logic, in the fear that affirmation of the rupture principle would encourage secessionist movements and indirectly derogate from the principle of territorial integrity.[166]

Regardless of whether one is satisfied with this explanation, a more important question remains — what is the present state of customary international law?

Succession by Quebec under Customary International Law

Would the Continuity Rule Bind Quebec under Customary Law?

The specific legal question that arises is whether there has been "evidence of a general practice accepted as law"[167] since 1978 that would make the continuity rule applicable to cases of secession. To answer that question in the affirmative, the acts of states applying the continuity rule would have to amount to a settled practice constituting a legal obligation to apply it. In the words of the International Court of Justice in the *North Sea Continental* cases of 1969,

> Not only must the acts concerned amount to a *settled practice*, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is *rendered obligatory* by the existence of a rule of law requiring it.[168]

In other words, a principle of customary international law requires the presence of two important elements: a general and settled practice; and a conviction on the part of states that the practice in question has become a legal obligation in the opinion of states. The second element is normally referred to as the *opinio juris*. In this writer's opinion, neither of the two elements is present in this case. Indeed, the practice of states in cases of secession since 1978 would generally support the traditional rule of the clean slate rather than the new one of continuity. Consequently, in principle, a new state of Quebec would start with a clean slate in respect of treaties. But would

this apply to basic human rights treaties generally and to the international covenants in particular?

Could Quebec Apply the Clean Slate Rule to Human Rights Treaties? Although it would start with a clean slate, basic human rights treaties might be binding on Quebec in two circumstances: if it has already formally accepted one or some of those treaties; or if some of their provisions can now be considered part of customary international law. The treaties with which we are concerned primarily are the international covenants on human rights of 1966.

As for formal acceptance of human rights treaties, Quebec did make such an acceptance of the two covenants and optional protocol, by special government decree in 1976.[169] True, such a decree was not necessary for the covenants to be binding on the territory of Quebec. Indeed, there is what could be called a 'federal state clause in reverse' in these covenants, making application of their provisions mandatory for all the component units of federal states. However, having chosen to adopt an instrument of 'ratification', as it was called, Quebec would have a very strong moral obligation (if not a legal one) to consider itself bound by the covenants, including their common article 1 on the right of self-determination of peoples.

In addition to its formal acceptance of the human rights covenants in 1976, the Quebec government undertook expressly to assume Canada's treaty rights and obligations in its draft bill on sovereignty, tabled on 7 December 1994. The bill provides that "Quebec shall assume the obligations and enjoy the rights arising out of the treaties to which Canada is a party and the international conventions to which Canada is a signatory, in accordance with the rules of international law". (section 7) It is not clear what distinction, if any, could have been intended between a 'treaty' and an 'international

convention', since both designate an international agreement governed by international law. It is not clear either whether the usual distinction is made between being a simple 'signatory' and being a 'party' to a formal treaty or convention. It must also be pointed out that the freedom to enjoy the rights and assume the obligations of Canada's existing treaties is limited to 'open' treaties. This freedom does not apply to bilateral treaties or to treaties among a small number of parties, nor does it apply to multilateral treaties that provide for the consent of all parties to admit new parties, such as the North Atlantic Treaty.

Regardless of the absence of clarity on these three points, a sovereign Quebec would assume the obligations of human rights treaties binding on Canada at the time of secession. This would also apply, of course, to ILO Convention No. 169 on Indigenous and tribal peoples, if Canada ratified it before secession occurred.[170]

As for human rights obligations under customary international law, the human rights movement has been so general and intense that we can now speak of certain peremptory norms of general international law with respect to human rights. For instance, the Arbitration Commission on Yugoslavia was able to state that such norms existed with respect to individual and collective rights of national minorities binding on all the parties to the succession.[171]

In a sense, human rights treaties can be said to constitute acquired rights, in that they are generally more important than ordinary private rights.[172] But even with respect to those, the Permanent Court of International Justice decided back in 1923 that "private rights acquired under existing law do not cease on a change of sovereignty...".[173] True, the court was concerned only with property rights, but the right to property is a human right, and some of the other rights, such as those pertaining to racial and minority groups, are even more important and should be considered acquired rights as well.

Specifically with respect to the human rights contained in the international covenants of 1966, it is important to note the opinion of a leading U.S. scholar in this area, Louis Henkin of Columbia University. In his course on international law at the Hague Academy of International Law in 1989, Henkin stated with respect to the Covenant on Civil and Political Rights that "it is now accepted that respect for a number of the rights protected by the Covenant has become an international obligation by customary law, for all States, and such obligations are *erga omnes*, to all States". Henkin went on to provide a minimum list of the rights whose existence in customary law no government has challenged, he stated, such as systematic racial discrimination and a pattern of gross violations of other human rights.[174] In addition, many scholars and commentators are of the view that article 1 of the covenants implies obligations with respect to Indigenous peoples.[175]

With respect to the Covenant on Economic and Social Rights, Henkin points out that states have adhered to that covenant in larger numbers than to the Covenant on Civil and Political Rights. Henkin recognizes that economic and social rights are much more difficult to implement; this is why the covenant provides for their progressive implementation, depending to a certain degree on the availability of resources. For this reason, perhaps, states have generally given priority to civil and political rights, but as Henkin says, there is no reason to sacrifice rights in one category to rights in the other.

In addition to customary law norms relating to human rights generally, similar norms can be said to have emerged recently with respect to the rights of Indigenous peoples specifically, although the specific content of these rights is still evolving.[176]

Conclusions

What follows is an attempt to summarize the main conclusions on state succession generally, particularly as it would apply to Quebec in case of secession.

1. There is a convention on the succession of states relating to treaty rights and duties, but it is not yet in force, and customary law is rather uncertain. There are two opposing views on succession: the clean slate, leaving the successor state free to choose which treaties it wishes to adopt, and the continuity doctrine, under which the new state inherits the treaties of the predecessor state.
2. The International Law Commission, which prepared the convention, incorporated the clean slate rule (subject to certain traditional exceptions) in its draft articles, as this represented the predominant view in doctrine, state practice and government comments on the draft articles.
3. In 1978, governments adopted the Vienna Convention on the Succession of States in respect of treaties, incorporating the clean slate rule for newly independent countries (basically, former colonies) and the continuity rule for cases of secession.
4. Since 1978 the practice of states has not been sufficiently general and uniform to result in a principle of customary law making it obligatory to apply the continuity doctrine for treaties in cases of secession.
5. Because of the overwhelming evidence in favour of the clean slate rule, it can be taken as representing customary law on the question, and Quebec would benefit from the clean slate rule.
6. Although Quebec would not succeed to Canada's human rights treaties, the human rights movement has been so general and intense that the basic treaty provisions have become part of

customary law. Indeed, the Arbitration Commission on Yugoslavia was able to state that the parties to succession were bound by peremptory norms with respect to individual rights of national minorities.

7. On the whole, it can be said that the rights contained in the 1966 human rights covenants, particularly the Covenant on Civil and Political Rights, now form part of customary international law; this applies particularly to the right of self-determination of peoples.

8. In addition, customary international law norms are now emerging with respect to the rights of Indigenous peoples.

9. Having chosen to adopt a special decree of 'ratification' in 1976, formally consenting to the human rights covenants and the optional protocol (although such ratification was not necessary), Quebec would be under a strong moral obligation (if not a legal one) to consider itself bound.

10. In its draft bill on sovereignty tabled on 7 December 1994, the Quebec government undertook expressly to assume Canada's treaty obligations, which include, of course, all those contained in human rights treaties.

ANNEX II
Canada's Fiduciary Obligation under General Principles of Law Recognized in National Legal Systems

by Donat Pharand

In addition to treaties and customary law, certain principles of law generally recognized in national legal systems may serve as a basis for the fiduciary obligation owing to Indigenous peoples.

Meaning and Applicability of General Principles of Law

Meaning of General Principles of Law

The International Court of Justice is enjoined expressly by its statute to apply "the general principles of law recognized by civilized nations".[177] International jurists generally agree that the term 'civilized nations' simply designates countries whose internal, social and political relations are governed by the rule of law and certain ideals of justice. Those general principles are not principles of international law as such, but are those generally applied by states in their own internal legal systems. As explained by Lord Phillimore to the committee of jurists that drafted the original statute in 1920, the general principles envisaged here are those that states have accepted *in foro domestico*. The difficulty with this source, however, is that its substantive content has never been determined. This determination would require a complete survey of the major legal systems of the world in order to extract common principles from them.

Applicability of General Principles of Law

The International Court of Justice has never based a decision or an advisory opinion solely on this third source as such. However, to give

greater weight to the legal basis of its judgements, the court has often qualified rules as "a general conception of law", "a principle ordinarily admitted", "a common principle of law", "a principle of law well established and generally recognized", and so on. Sometimes the court has actually applied certain principles of domestic law generally recognized to dispose of arguments made by the parties.[178] In the *Gulf of Maine* case, the court refuted Canada's argument that the United States was estopped by its long silence from disputing the maritime boundary delimitation line established by Canada. The court discussed at length the common law doctrine of estoppel and the related concept of acquiescence. It even specified that those concepts were "based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion".[179]

Of direct relevance to the fiduciary obligation owed to Indigenous peoples is the *International Status of South West Africa* case, in which Sir Arnold McNair drew upon the English common law trust to determine the meaning of the "sacred trust of civilization" accepted by South Africa under its mandate. In his separate opinion, Sir Arnold began by explaining that "[i]nternational law has recruited and continues to recruit of its rules and institutions from private systems of law". Agreeing with Brierly's opinion that "the governing principle of the Mandates System is to be found in the trust", Judge McNair stated that "the historical basis of the legal enforcement of the *English trust* is that it was something which was *binding upon the conscience of the trustee*; that is why it was legally enforced".[180] In other words, the trust is considered sacred because it is binding upon the conscience of the

trustee, and this principle applies whether the trustee is an individual or a state.

In light of this, it is suggested that the principles of law and institutions that have been recognized by states in their trust relationship with Indigenous peoples on their territory have become authoritative in international law. More specifically, those principles can be used to determine a common *corpus* of fiduciary obligations arising out of that relationship. To make that determination, this paper draws mainly on studies prepared for the Royal Commission.

Fiduciary Obligation in National Legal Systems

The studies for the Royal Commission review the national legal systems of countries in North America, Europe and the South Pacific, where that special trust relationship has been held to exist with Indigenous peoples. More specifically, the legal systems reviewed are those of the following countries: Australia, New Zealand, the Nordic Countries (Norway, Sweden and Finland), the United States and Canada. Within Canada, special attention will be paid to Quebec.

Australia

No fiduciary relationship was established at the time of British settlement, since this took place on the assumption that the continent was *terra nullius*. However, this concept was rejected by the Supreme Court of Australia in 1992, in *Mabo* v. *Queensland*, in which the Aboriginal title of an inhabitant of one of the islands of the Torres Strait was recognized. Certain Australian Aborigines claim the right of complete self-determination, but the majority confine their demand to self-government within Australia, and this is gradually being recognized.[181]

Both the commonwealth and state governments can pass legislation with respect to Aboriginal people; in case of conflict, the federal law prevails. With the exception of the Aboriginal title recognized in the *Mabo* case, land title remains in the Crown. However, a number of reserves have been established in certain states, and almost 15 per cent of the country has now been set aside for the exclusive use of Aboriginal peoples.[182] Under present land rights legislation, it is possible for the federal government and the government of South Australia to adopt legislation recognizing title in the Aborigines to their traditional territory but without any mineral rights.[183] In addition, Australia has passed sacred sites legislation in various parts of the country recognizing the spiritual connection between Aboriginal people and certain lands. This protection extends also to spiritually important objects and ensures that sacred sites and objects are not destroyed. As well, in September 1991, a Council for Aboriginal Reconciliation was established composed of 25 members, 14 of whom are Aboriginal.

New Zealand

The basic document governing the relationship with Indigenous peoples is the Treaty of Waitangi of 1840. By that treaty, the Aboriginal chiefs ceded to Queen Victoria "all the rights and powers of Sovereignty".[184] In return, the Queen guaranteed "the full exclusive and undisturbed possession of the Lands" possessed by Indigenous peoples. However, the Queen was given the "exclusive right of Preemption" (article 2). In the same treaty and as part of the consideration, the Queen extended "to the Natives of New Zealand Her royal protection" and gave them "all the Rights and Privileges of British Subjects" (article 3).

An important step taken in 1975 was adoption of the *Treaty of Waitangi Act*, which created a tribunal to report and make recommendations on land claims and related matters. The tribunal was

quickly flooded with some 150 Maori claims. By November 1993, "the Tribunal had reported on 46 treaty claims on matters including land alienation, sewage disposal, thermal power, fishing, geothermal resources and the Maori language". Although the recommendations of the tribunal are not binding on the Crown, the New Zealand Court of Appeal held in a unanimous 1987 decision that "where the Waitangi Tribunal had found some merit in a claim and recommended redress, then the Crown should act accordingly unless grounds could be found for a reasonable partner to withhold".[185]

On the extent of the fiduciary obligation of the Crown under the treaty, the Waitangi Tribunal has interpreted that obligation very generously with respect to Indigenous peoples. In recognizing "the Crown obligation actively to protect Maori treaty rights", it is stated that

> the fiduciary duty includes the need to ensure that Maori are not unnecessarily inhibited by legislative or administrative constraints from *using their resources according to their cultural preferences*; and that the Crown cannot avoid its Treaty duty of active protection by delegation of responsibility for the control of natural resources to local government, so that the duty to actively protect is diminished.[186]

In addition, the tribunal has interpreted the Treaty of Waitangi as protecting three further rights: the tribal right of self-regulation; the right of redress for past breaches; and the duty to consult fully with Maori before the Crown makes any decisions that may impinge on the chieftainship authority of the tribe.

The 1987 Court of Appeal decision also established the principle of partnership as the treaty's primary principle,

> requiring Maori and Pakeha [the non-Maori residents of New Zealand] to act towards each other reasonably and in good faith. This finding articulated the Maori/Crown relationship in terms appropriate to the relationship between partners in a law practice and established key principles, such as *compensation for breach of faith and notions of fiduciary duty*.[187]

In addition to the Waitangi Tribunal, there is a Maori Land Court to facilitate the leasing or sale of Maori lands to non-Maori, and several members of this court are also members of the Waitangi Tribunal.[188]

As for natural resources, the extent of Maori rights appears to be uncertain. Several claims in this regard have been filed with the Waitangi Tribunal. A decision of the Tribunal resulted in the allocation of 10 per cent of the deep sea and inshore fishery to Maori harvesters.

An important element of self-government to be noted is the fact that a minimum of four seats in the Parliament of New Zealand are reserved for the Maori.

Norway, Sweden and Finland

The Indigenous people living in these countries, overlapping a little on Russian territory, is called the Sami and numbers about 30,000. The Sami have established two Sami parliaments, one in Norway, the other in Finland. Bradford Morse states that "[b]oth countries have accepted the importance of recognizing separate legal entities to represent the interests of the Sami people in dealing with national governments".[189] The Sami have attained an appreciable degree of self-government and have managed to gain protection for their language, culture and traditional lifestyle. Generally speaking, however, the Sami have had little success before the courts in obtaining recognition for their Aboriginal rights. An important exception is a 1981 decision of the Swedish Supreme Court, in which the court "supported the principle that ownership of land and water could be derived from customary use".[190] The Norwegian courts have not given any similar recognition, and in 1982 the Sami were unsuccessful in halting construction of a major hydroelectric dam that was alleged to interfere with their Aboriginal rights.

The United States[191]

Like its earlier forms, the contemporary exercise of trusteeship by the United States is in keeping with international trends. Executive policy and legislative enactments from the 1960s to the present indicate a shift in the way the United States sees its trusteeship role. This gradual transformation of the exercise of trusteeship mirrors the concurrent emergence of new norms regarding Indigenous peoples operating at the international level.

The U.S. government continues to describe its relationship with Indigenous peoples in terms of a trusteeship. As in the past, the federal government's role as a trustee refers, in part, to its substantial powers over Indian affairs. An extensive bureaucracy, the Bureau of Indian Affairs (BIA), continues to exercise substantial influence over tribal affairs. Besides managing tribal resources, the BIA has programs for education, housing, building and maintaining roads, providing emergency relief, and administering grant programs. The United States also holds legal title to tribal lands and other major tribal assets.

While courts still invoke the trusteeship doctrine to uphold federal discretion in regulating Indian affairs as it carries out its duty to protect them,[192] the trust relationship also imposes some limitations on executive authority. Particularly in cases involving claims of federal mismanagement of Indian natural resources, courts have held the federal government liable for breach of fiduciary duty to Indians.[193] The trusteeship responsibility thus imposes a limited judicially enforceable duty on the federal government in its specific role as a legal trustee over assets it holds for the benefit of Indians.

The trusteeship doctrine also supports a broader, non-judicially enforceable obligation accepted by the legislature and the executive in treating Indigenous peoples. Although courts have not directly enforced a broad trust responsibility on the federal government, they have relied

on the trust doctrine in resolving issues brought on other grounds, particularly in construing federal statutes conferring benefits on Indians.[194] And although courts have viewed the trusteeship duties of Congress largely in terms of justifying its plenary power over Indians, Congress itself has come to view its duties as tied to the federal policy of promoting Indian self-determination. In addition, the BIA increasingly sees its trusteeship responsibility in the perspective of a federal policy of Indian self-determination, moving away from its tradition of paternalism toward Indigenous peoples.

A new U.S. policy to promote Indian self-determination, in line with contemporary developments leading to reformulated international norms concerning Indigenous peoples, was initiated in 1970. President Nixon declared the assimilation policy a failure and urged Congress to "begin to act on the basis of what the Indians themselves have long been telling us...to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[195] Nixon called for legislative measures to ensure Indian self-determination by preserving the integrity of Native tribes and allowing them to manage their own affairs.

The reform of Indian policy urged by President Nixon was set in motion by the *Indian Self-Determination and Education Assistance Act* of 1975.[196] The act is designed to place control of the planning and administration of federal programs for the benefit of Native Americans primarily in the hands of the tribes themselves. The secretaries of the Interior and Health and Human Services are authorized under the act to enter 'self-determination contracts' with tribes to negotiate arrangements for tribes to plan, conduct, and administer federal programs for their benefit.[197] The *Indian Financing Act* of 1974 established a $50 million revolving fund to provide loan and grant programs for the development of Indian resources.[198] An additional effort to improve the economic

self-determination of tribes is evident in the *Indian Tribal Government Tax Status Act*, which conferred on tribes many of the tax status benefits enjoyed by states.[199]

The 1988 amendments to the *Indian Self-Determination Act* created a self-governance demonstration project to allow a limited number of tribes to enter into self-governance 'compacts' with the federal government. Under these compacts, tribes that have successfully managed other contracts under the *Indian Self-Determination Act* can extend their self-governance over all other functions and activities performed by the Bureau of Indian Affairs or the Indian Health Service.[200] Federal assistance under the amended act is allocated to qualifying tribes in the form of a block grant, allowing tribes to determine what their needs are and how to carry them out. Under 1991 amendments, the demonstration project was extended from five to eight years, the number of eligible tribes was expanded, and funding was increased.

The development of programs incorporating Native American cultural perspectives involved the enactment of legislation such as the *Indian Child Welfare Act* of 1978 (ICWA).[201] The act seeks to remedy widespread practices of placing Indian children in adoptive and foster homes, as well as placing Indian children in boarding schools, often as a result of social workers' misconceptions of Indian family structures. The ICWA, designed to maximize tribal jurisdiction over child placement decisions and limit state intervention in such decisions, recognizes that decisions about whether Indian children should be separated from their families are of vital importance to tribes.[202] Congress states the purpose of the act as

> to protect the best interests of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of

> Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[203]

Making express reference to the United States' trusteeship duties toward Indian tribes, the act recognizes further

> that there is no resource that is more vital to the *continued existence and integrity of Indian tribes* than their children and that the United States has a direct interest, as *trustee*, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.[204]

By linking the trusteeship responsibility directly to the continued integrity of Indian tribes, Congress envisions anew the trusteeship role in accordance with modern international expectations for the treatment of Indigenous peoples by states.

Similarly, Congress invoked the federal government's "historical and unique legal relationship with, and resulting responsibility to, the American Indian people" as part of its findings in enacting the *Indian Health Care Improvement Act*.[205] Designed to improve federal health services for Native Americans in light of evidence of poor health status among Indians as compared to the general population, the act pledged to "encourage the maximum participation of Indians in the planning and management of those services." Again, Congress emphasized both the historical trusteeship duties of the United States and the importance of Indian participation in providing services for their benefit.

The *Indian Religious Freedom Act* of 1978 underlined the federal policy to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions."[206] The act requires the president to direct federal agencies to consult with Indian religious leaders in determining appropriate changes in policy or procedures needed to protect and preserve cultural

rights and practices (section 2). Although the act has been declared non-judicially enforceable,[207] it stands as an important policy statement to guide administrative decisions within the federal bureaucracy.

In 1983 President Reagan reaffirmed the goal of reducing tribal dependence on the federal government and increasing tribal self-governance in accordance with President Nixon's self-determination policy. Reagan criticized the pattern of "excessive regulation and self-perpetuating bureaucracy" that has "stifled local decision making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency."[208] He called for a reversal of this trend, announcing a policy "to reaffirm dealing with Indian tribes on a government-to-government basis", while at the same time continuing to "fulfill the Federal trust responsibility for the physical and financial resources we hold. ...The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards."

In the *Native American Graves Protection and Repatriation Act*, the "special relationship" between the federal government and Indian tribes is invoked again in the context of a framework for the repatriation of Indian human remains and funerary objects held by museums or federal agencies.[209]

More recently, President Clinton met at the White House on 29 April 1994 with representatives of hundreds of American Indian tribes, becoming the first president to summon the leaders of all 547 federally recognized tribes to a meeting with the executive. Clinton issued two executive orders, the first of which calls on his administration to treat tribes with the same deference given to state governments, requiring federal agencies to deal directly with Indian nations, rather than referring their concerns to the Interior department.[210] A second order modified the *Endangered Species Act* to facilitate the collection of eagle feathers for use in Indian religious ceremonies.

Following the meeting with President Clinton, more than 200 Native American leaders met in Albuquerque with Attorney General Janet Reno and Secretary of the Interior Bruce Babbitt for an unprecedented two-day National American Indian Listening Conference. The conference was organized as a forum for negotiating ways to strengthen tribes' sovereign status and to resolve conflicts with the federal government over the management of tribal natural resources and the power of tribal courts.[211]

In a concurrent resolution in 1993, the Senate appeared to acknowledge the international character of U.S. obligations toward Indigenous peoples by addressing the duties of the United States toward Native Americans in the context of Indigenous peoples' rights. In response to the United Nations resolution declaring 1993 the International Year of the World's Indigenous People, the Senate urged the United Nations to proclaim an International Decade of the World's Indigenous People. The Senate resolution expressed the "sense of Congress" that the United States should support the United Nations in its efforts to raise public awareness and to establish international standards on the rights of Indigenous peoples and, further, that the United States should "address the rights and improve the social and economic conditions of its own indigenous peoples."[212]

The federal government's awareness of Indigenous peoples' rights as an international human rights concern is reflected in the State Department's inclusion of a separate category reviewing national treatment of Indigenous peoples in its report on human rights practices of 1993. The 1993 annual report methodically reviewed the extent to which a country's Indigenous peoples are able to participate in decisions affecting their lands, cultures, and natural resources, and assessed protection of Indigenous peoples' civil and political rights.[213]

Denmark (Greenland)

Since 1978, Greenland has constituted a "distinct community within the Kingdom of Denmark".[214] The self-government enjoyed by Greenlanders, called home rule, means that, in principle, they have complete control of their internal affairs. Greenland has its own parliament, where its population of more than 50,000 – more than 40,000 of whom are Inuit – is represented. Its economy is based mainly on renewable resources. Foreign relations and defence matters are reserved to Denmark. However, where treaties are of particular interest to Greenland, the law establishing home rule requires that they be referred to home rule authorities for their comments, and the latter might even be allowed to participate in the negotiation of the treaty in question (sections 13-16).

All land in Greenland is public property; there is no private ownership of land. However "the resident population of Greenland has fundamental rights in respect of Greenland's natural resources" (section 8), and the home rule government now exercises full authority over the development and use of land. In other words, although all the resources are owned by the Danish Crown, they are managed by the home rule government for the benefit of all Greenlanders. The home rule government raises its own revenues, but the tax base is insufficient, and Denmark must still provide for the majority of the budget of Greenland.[215]

Canada (Quebec)

The assessment of Bradford Morse is that "Canada looks very enlightened and positive in relation to Scandinavia and Australia but far less so when examined in comparison to many aspects of American and New Zealand policy".[216] In his comparative assessment of Quebec relative to the other provinces, Morse examined the protection accorded

to Indigenous peoples of that province in six specific areas: Aboriginal languages, education, health and social services, economic initiatives, land claims, and self-government.

On languages, he concluded that "[o]verall the situation in Quebec is far better than most regions of Canada, as eight languages are still spoken. Six of those languages still have a significant degree of use".[217] Protection for Aboriginal languages is found in the preamble of the Charter of the French Language (Bill 101), which expressly recognizes the rights of Indian peoples and Inuit to preserve and develop their own languages and cultures. The charter also exempts Indian reserves from the application of the Charter. Moreover, as a result of the James Bay and Northern Quebec Agreement (JBNQA), there has been a strengthening of formal instruction in Cree and Inuktitut.

In education, Morse concludes that "[t]he government of Quebec has in general been far more supportive of educational initiatives, particularly for the Cree and Inuit, than any other provincial government in Canada".

In health and social services, "[t]he Province of Quebec has not been seen as a leader in facilitating the development of autonomous Aboriginal organizations in this sphere although its record is far superior to that of many other provinces". However, it has authorized the Mohawks of Kahnawake to construct and administer their own hospital and provides provincial funds for its operation.

As for economic initiatives, "Quebec has been a leader among provinces in sponsoring economic development within Aboriginal communities and First Nations through provision of social grant programs". It has also established an income support program under the JBNQA to encourage the traditional subsistence economy.

In land claims, "[t]he province of Quebec was the first province in Canada to accept the continued existence of Aboriginal title and to

respond to this recognition through seeking to negotiate land claims settlements". Morse points out, however, that this acceptance came only after a decision in the *Kanatewat* case of 1973. Morse's conclusion on this point is that "in comparison to the attitude of other provinces, Quebec has adopted an overall position that can be perceived as far more favourable to Aboriginal peoples and their interests in their traditional territory".

On the question of self-government, "[t]he government of Quebec has also been the provincial leader in fostering the desires of Aboriginal people to exercise greater control over their lives and the affairs of their communities".

As a concluding note with respect to Quebec's recognition of its obligation toward the Aboriginal peoples within its boundaries, two recent proposals should be mentioned. The first was made in December 1994 and is an "Offer of the Quebec Government within the Framework of the Negotiation of the Comprehensive Land Claims of the Atikamekw and Montagnais Nations". The parties to the formal agreement would be the government of Quebec, the government of Canada, the Atikamekw Nation and the Montagnais Nation. As stated in the introduction to the agreement, the offer "contains everything that is needed to draw up a new social contract between the two nations and Quebec society". They "focus on the territory, resource management and development, self-government and government funding, economic development and the payment of compensation". In particular, the proposal provides for the transfer to title of some 4,000 square kilometres of territory to the twelve communities of the two nations and the use of 40,000 square kilometres for traditional activities such as hunting and fishing. The autonomous governments would exercise jurisdiction over their own political structure and the management of their lands and resources, as well as services such as education, health

and social services, income security, administration of justice and public security.

The second proposal was made at the end of January 1995 and is addressed to the residents of Nunavik, 90 per cent of whom are Inuit. The proposed agreement in principle would transfer to the future legislative assembly of Nunavik jurisdiction over such matters as education, health and social services, and the administration of justice, and would also involve the payment of compensation.

Conclusions

1. Certain general principles of law are recognized in national legal systems, relating to the fiduciary obligation owing to Indigenous peoples.
2. The fiduciary obligation can be said to result from a 'sacred trust' (the expression used in the mandate system) that is legally enforceable, as is the trust in English law, because it is "binding upon the conscience of the trustee", to use the words of Judge McNair of the International Court of Justice.
3. In the various national legal systems reviewed, there exists a general *corpus* of subject-matters covered by the fiduciary obligation that could be considered binding on Quebec. These include at least the following: self-government, Aboriginal title, compensation for breach of faith, duty to consult, and the principle of partnership.
4. The Quebec government is now pursuing negotiations with some Aboriginal peoples to conclude agreements on land claims and self-government. It appears to be taking its fiduciary obligation quite seriously.

Annex III
The International Labour Organisation Convention on Indigenous Peoples (1989): Canada's Concerns

by Donat Pharand

Introduction

This convention, known as ILO Convention No. 169, is a revision of Convention No. 107, adopted in 1957, and was intended to update international standards and take into account developments in international law. In the words of the convention's preamble, those developments have made it "appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the early standards".[218] The convention was adopted by vote of 328 for, 1 against, and 49 abstentions. It came into force on 5 September 1991, twelve months after its ratification by two member states, Mexico and Norway. Canada has not yet ratified the convention, and it is not known at what stage of the internal consultation process matters now stand.

Under the ILO constitution, the obligations of federal states such as Canada are not as stringent as those of unitary states, because of the division of legislative powers. When a convention falls within the jurisdiction of both orders of government, the only obligation on the part of a federal state is to refer the convention to the appropriate federal and provincial authorities for the enactment of legislation or other action.[219] In this instance, the federal department of Justice advised the department of Labour that the subject-matters covered by the convention fell within both federal and provincial legislative jurisdiction.[220] The federal government must also arrange for periodic

consultations with the provinces to co-ordinate the adoption of the implementation measures. It must then inform the director general of the ILO of the measures taken and report periodically to the ILO on the extent to which effect has been given to the convention. As stated in a department of Labour document on the Convention, "The long-standing practice in Canada, as regards ILO Conventions coming under both federal and provincial/territorial jurisdictions, has been to ratify a Convention only if all thirteen jurisdictions concur with ratification and undertake to implement the Convention's requirements pertaining to their respective jurisdictions".[221]

The document goes on to say that, because of the complexity of the convention, the involvement of the provinces, and the ambiguity of certain provisions, "any assessment as to whether Canada would be in a position to ratify Convention 169 will need to be preceded by further consultations with the provinces, as well as consultations with Canada's indigenous peoples and with other interested parties". More precisely, Labour Canada says there are "possible issues regarding the compatibility between the Convention and the Canadian situation".[222]

Canada's Concerns about the Convention

Canada's concerns relate to the following subject-matters: (1) ownership of lands traditionally occupied; (2) ownership of Indian reserve lands; (3) indigenous customs in penal matters; (4) indigenous educational institutions; and (5) the definition of 'lands'. In addition, it is relevant to mention a more general concern that Canada expressed at the time the convention was adopted, and this relates to the meaning of the term 'people'. Each of these concerns is examined in an effort to determine its substantive validity.

Ownership of Lands Traditionally Occupied

The concern arises out of article 14, paragraph 1, which provides that "The rights of ownership and possession of the peoples concerned over lands which they traditionally occupy shall be recognized."

Canada points out that existing Aboriginal rights in land, protected by Canada's constitution, "may encompass significant areas of Canada which are also subject to the rights of the Crown and of third parties". The federal government's policy on comprehensive claims permits the exchange of these Aboriginal rights in certain lands for Aboriginal ownership of smaller areas, but this policy is not based on a prior recognition of Aboriginal ownership. Consequently, "a requirement to recognize aboriginal ownership of all lands which are subject to aboriginal rights would...not appear to correspond to Canadian law and practice".[223]

Indian Reserve Lands

In the same way, article 14 would require a recognition of Aboriginal ownership in all Indian reserve lands. Full title to these lands is, of course, held by the Crown, although bands have their full use and benefit. In negotiating self-government arrangements, bands may request a transfer of full ownership of reserve lands, but they are not obliged to do so.

Canada's concern with these first two subject-matters arises from the fact that under Canadian legislation, rights of ownership and of possession are different. Unless there is a complete cession, the Crown retains ownership or title, and Indigenous people enjoy possession only. It ought to be possible for Canada to come to an agreement with Indigenous peoples on a comprehensive land claims policy that would meet the requirements of article 14. The only substantive requirement of that provision is one of recognizing "rights of ownership and

possession". The other two paragraphs of article 14 make this clear in providing for two procedural steps: first, identifying the lands traditionally occupied and, second, establishing land claims settlement procedures. Canada has already taken steps to meet the requirements of the whole of article 14, and those ought to be sufficient to permit ratification.

Canadian ratification should be all the more possible in that the convention contains a general override clause, of a flexible character, with respect to implementing measures. It provides that "The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, *having regard to the conditions characteristic of each country*".[224] This general provision makes it abundantly clear that a party meets its treaty obligations when it can show that it is making its best efforts and acting in good faith. The 'good faith' requirement not only conforms with a fundamental principle of general treaty law[225] but, for Canada, is also part of its general fiduciary obligation to Indigenous peoples.

Indigenous Customs in Penal Matters and Sentencing

Three provisions in the convention relate to indigenous customs. They provide that, in applying national laws and regulations to Indigenous people, due regard be given their customs or customary laws.[226] They also provide that, to the extent compatible with the national legal system, the methods used customarily by Indigenous peoples to deal with offences be respected.[227] In addition, the "customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and Courts dealing with such cases".[228] Finally, in imposing penalties, "preference shall be given to methods of punishment other than confinement in prison".[229]

Canada's concern is that "indigenous customs pertaining to penal matters must *always* be taken into consideration by the Courts".[230] In fact, the word 'always' does not appear in the text of the convention, and the Labour document points out that, in practice, Canadian courts do take indigenous customs into account in sentencing.[231] It is true that the *Criminal Code* does not impose an obligation to do so, but surely the practice reflects no more than a fair-minded and generous attitude flowing from the fiduciary obligation of the Crown to Indigenous peoples in the administration of criminal justice. It would appear, therefore, that Canada already meets the obligations imposed by the convention.

Indigenous Educational Institutions

The convention provides for governments to recognize the right of Indigenous peoples "to establish their own educational institutions and facilities", on condition that they meet minimum standards. In addition, "[a]ppropriate resources shall be provided for this purpose".[232]

Canada already provides educational facilities for Indigenous peoples, and "[i]n specific cases, indigenous groups have had the opportunity to establish separate educational institutions — band-operated schools on reserves and aboriginal community colleges — and have received financial support for this purpose." However, "such financial support depends upon particular circumstances, including the number of students involved and whether their needs could be addressed within the framework of the general education system".[233]

Obviously, the main worry is that Canada will not be able to meet its obligation to provide "appropriate resources". Although this worry is a very serious one in this difficult period of financial restraint, the general override provision on implementation measures discussed earlier should afford a satisfactory answer to Canada's concerns.

Definition of 'Lands'

Article 13 of the convention provides that "[t]he use of the term 'lands' in articles 15 and 16 shall include the concept of territories which covers the total environment of the areas which the peoples concerned occupy or otherwise use". Canada's concern is that the expression 'total environment' is unclear and open to a variety of interpretations.[234] As implied in the definition, the term 'lands' in the plural is used here as a synonym for 'territories'. When used in international law, this term normally includes all inland waters and, in the case of an archipelago, all water areas enclosed by straight baseline. This is the case for the Canadian Arctic archipelago, since the establishment of straight baselines in 1985. As well, the Inuit of Canada have always considered sea ice as 'land' for the purposes of hunting and fishing, and Canada has recognized this already in its agreements with the Inuit.[235]

In article 15, referred to in the definition of 'lands', states agree to safeguard the rights of Indigenous peoples to the "natural resources pertaining to their lands" and, in cases where the state retains ownership of mineral or subsurface resources, to pay fair compensation for any damage resulting from the exploitation of those resources. These principles seem to have been respected by Canada in the Inuvialuit Final Agreement of 1984. As for Article 16, it prohibits the removal of Indigenous peoples "from the lands which they occupy" and, if a relocation should be necessary as an exceptional measure, such relocation is to take place "only with their free and informed consent". The last principle was obviously not so well established in international law at the time Canada relocated some Inuit to the High Arctic in 1950 and 1953. Since then, the Royal Commission on Aboriginal Peoples has found that the relocation was not voluntary and has recommended that the government apologize and pay compensation to the relocatees.[236]

Presumably, the government will accept those recommendations and should have no problem subscribing to article 16.

Meaning of 'Peoples'

Article 1 of the convention specifies that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law". It is obvious, of course, that the intention was to insure that the convention could not be construed as supporting the right of Indigenous peoples to complete self-determination in international law. Indeed, in a written communication to the ILO, Canada specified that "any use of the term 'peoples' would be unacceptable without a qualifying clause which would indicate clearly that the right to self-determination is not implied or conferred by its use".[237] According to Douglas Sanders, the disclamatory language in the convention "was inserted largely at the insistence of Canadian government representatives, who opposed the use of the word peoples".[238]

With respect to Canada's fear that the term 'peoples' would be given too liberal an interpretation in relation to the right of self-determination of Indigenous peoples, it should be noted that the 1993 Draft Declaration on the Rights of Indigenous Peoples would seem to alleviate any remaining fear. Although the declaration goes further than the convention, in that article 3 recognizes the right of self-determination of Indigenous peoples, the only specific form envisaged to exercise that right is in article 31: "autonomy or self-government in matters relating to their internal and local affairs". It must be noted, however, that the substantive content of the declaration is still evolving, as is recognition of the rights of Indigenous peoples generally.[239]

Conclusion

In conclusion, it can be stated that ILO Convention No. 169 recognizes numerous individual and collective rights that can be considered to arise from a fiduciary obligation on the part of states. The convention has been in force since 1991, and eight states are now parties: Mexico, Norway, Colombia, Bolivia, Costa Rica, Honduras, Nicaragua and Peru. Canada has not yet ratified the convention, not only because the federal government has to consult the provinces and territories but also, and perhaps particularly so, because it is concerned about certain obligations imposed by the convention. These relate to five specific matters: (1) ownership of lands traditionally occupied by Indigenous peoples; (2) ownership of Indian reserve lands; (3) taking account of indigenous customs in penal matters and sentencing; (4) allowing and funding indigenous educational institutions; and (5) the wide definition of 'lands'.

An examination of Canada's concerns leads to the conclusion that they should not prevent Canada ratifying the convention, particularly (but certainly not exclusively) because of the convention's general override clause, which provides that implementation measures must be determined "in a flexible manner, having regard to the conditions characteristic of each country". As for Canada's more general concern about the meaning of the term 'peoples' in the convention, it seems quite clear that it could not be construed as supporting a right to complete self-determination in international law.

Notes

Introduction

1. This paragraph relies heavily on R. St. J. Macdonald, "The Relationship Between International Law and Domestic Law in Canada", in *Canadian Perspectives on International Law and Organization*, ed. Macdonald et al. (1974), p. 111. This approach, based on *adoption* of customary rules rather than *transformation*, was set forth authoritatively by the Supreme Court of Canada in *The Foreign Legations Case* [1943] S.C.R. 208.

Part I

2. Emerich de Vattel, *The Law of Nations or the Principles of Natural Law* (Classics of International Law edition, 1916), p.3.

3. 30 U.S. (5 Pet.) 1 (1831), p. 17.

4. 31 U.S. (6 Pet.) 515 (1832), pp. 560-561, quoting Vattel.

5. A few years after the *Cherokee* cases, the Supreme Court reporter Henry Wheaton published a treatise on international law in which he explained the character of the consensual protectorate concept invoked by Marshall, emphasizing that the protectorate relationship between nations or states exists on the basis of "express compact". Henry Wheaton, *Elements of International Law* (1836), section 33 (Dana edition, 1866).

6. See, generally, *Imperialism*, ed. Philip D. Curtin (1971), pp. 1-40, for excerpts from original nineteenth-century texts explaining the inherent inferiority of non-white cultures and races through pseudo-scientific reasoning.

7. Published in Francisi de Victoria, *De Indis et de Iure Belli Reflectiones*, ed. E. Nys, trans. J. Bate (1917), pp. 160-161.

8. United Kingdom, House of Commons, Select Committee on Aboriginal Tribes, *Report* (1837), quoted in Russel Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (1980), p. 86.

9. Lord John Russell to Sir George Gipps, 23 August 1840, reprinted in Alpheus Henry Snow, *The Question of Aborigines in the Law and Practice of Nations* (1918), 1972 ed., p. 29.

10. See *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects 1884-1885*, ed. R.J. Gavin and J.A. Bentley (1973).

11. General Act of the Conference of Berlin, article VI, reprinted in *The Scramble for Africa*, cited in note 10, p. 291. See also M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), pp. 333-334, citing similar provisions in the concluding acts of subsequent conferences.

12. Lindley, cited in note 11, pp. 324-336. But see *South West Africa Case (Phase 2)*, Reports of Judgments, Advisory Opinions and Orders (International Court of Justice) [cited hereafter as *I.C.J. Rep.],* 1966, pp. 34-35, declining to recognize the international juridical character of such trusteeship precepts operative in the late nineteenth and early twentieth centuries, other than those arising directly from the League of Nations mandates system.

13. *War and Peace: Presidential Messages, Addresses, and Public Papers (1917-1924)*, ed. R. S. Baker and W.E. Dodd (1927), p. 411.

14. Covenant of the League of Nations, article 22, paragraph 1.

15. For example, the Covenant of the League of Nations, article 22, paragraph 2: "the tutelage of such peoples should be entrusted to advanced nations".

16. Depending upon the circumstances of each, the territories placed under League mandate were to be (1) assisted toward independent statehood; (2) loosely administered by the designated mandatory power to provide basic guarantees of public order and security; or (3) included under the general administrative and legal regime of the mandatory power as an integral part of its territory. (Covenant of the League of nations, article 22, paragraphs 3-6)

In addition to establishing the system of mandates, the covenant committed *all* League members to "undertake to secure the just treatment of the native inhabitants of territories under their control." (article 23(a))

17. Charter of the United Nations, article 73; see also articles 75-85, establishing parallel international trusteeship system.

18. General Assembly Resolution 1514 of 1960 confirmed the practice establishing the norm of independent statehood for colonial territories with their colonial boundaries intact, regardless of the arbitrary character of most such boundaries. See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, p. 67, U.N. Doc. A/4684 (1960): "Immediate steps shall be taken, in...Non-Self-Governing Territories...to transfer all powers to the peoples of those territories"; and Malcolm Shaw, *Title to Territory in Africa* (1986), p. 93, discussing the arbitrary character of colonial boundaries in Africa in terms of the ethnic composition of the Indigenous populations, boundaries left intact through decolonization.

Under the companion Resolution 1541 and related international practice, self-government is also deemed implemented through the association or integration of a colonial territory with an independent state, as long as the resulting arrangement entails a condition of equality for the people of the territory concerned and is upheld by their freely expressed wishes. G.A. Res. 1541(XV), U.N. GAOR, 15th Sess., Annex, Agenda Item 38, p. 10, U.N. Doc. A/4651 (1960). Ofuatey-Kodjoe concludes that Resolution 1541 generally reflects international practice in the application of the principle of self-determination to the colonial territories. (Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (1977), pp. 115-128)

19. See notes 21-23 and accompanying text.

20. See Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* (1990), pp. 5-6 (U.N. Sales No. E.90. III.A.9).

21. International Labour Organisation Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957 (entered into force 2 June 1959) [referred to hereafter as Convention No. 107].

22. The first paragraph of the first article of the convention states: "This Convention applies to...*members* of tribal or semi-tribal populations..." [emphasis added].

23. Rodolfo Stavenhagen, "La Situación y los Derechos de los Pueblos Indígenas de América", *América Indígena* 63/1-2 (1992).

24. In the United States, for example, several young Indians, among them college graduates, appeared uninvited at the 1961 Conference on Indian Policy organized with the help of the University of Chicago Anthropology Department. They issued a statement declaring "the inherent right of self-government" of Indian people and that they meant "to hold the scraps and parcels [of their lands] as earnestly as any small nation or ethnic group was ever determined to hold on to identity and survival." Furthermore, the young activists used the conference as a springboard for the creation of the National Indian Youth Council and with it a new form of Indian advocacy connected with the larger civil rights movement. Later developments included the formation of other Indian activist organizations, including the American Indian Movement and its international arm, the International Indian Treaty Council.

25. Important elements of this process included widely read works by indigenous authors, for example, Vine Deloria, Jr., *Custer Died for Your Sins* (1969) (Deloria is a Standing Rock Sioux); and Ramiro Reinaga, *Ideología y Raza en América Latina* (1972) (Reinaga is a Quechua).

26. Indigenous peoples' representatives appeared before United Nations human rights bodies in increasing numbers and with increasing frequency, grounding their demands in generally applicable human rights principles. See, generally, National Lawyers' Guild, *Rethinking Indian Law*, pp. 139-176, discussing Indigenous peoples' efforts in the late 1970s and early 1980s within the United Nations Human Rights Commission and its Sub-Commission on Prevention of Discrimination and Protection of Minorities. See also notes 42 and 48-50 and accompanying text, discussing Indigenous peoples' participation in the United Nations Working Group on Indigenous Populations, created in 1982; and Getches et al., *Federal Indian Law: Cases and Materials*, 3rd ed. (1993), pp. 1029-1032, discussing cases involving Indigenous individuals and groups before the United Nations Human Rights Committee pursuant to the complaint

procedures of the Optional Protocol to the International Covenant on Civil and Political Rights.

Indigenous peoples have enhanced their access to these bodies as several organizations representative of indigenous groups have achieved official consultative status with the United Nations Economic and Social Council, the parent body of the United Nations human rights machinery. Additionally, Indigenous peoples have invoked procedures within the Organization of American States, particularly its Inter-American Human Rights Commission. See Getches et al., cited above, pp. 1032-1033, discussing cases brought by representatives of Indigenous peoples before the Inter-American Human Rights Commission. The use of international human rights procedures by Indigenous peoples was encouraged by the publication in 1984 of *Indian Rights—Human Rights: Handbook for Indians on International Human Rights Complaint Procedures*, a small book written with the non-lawyer in mind. This publication by the Indian Law Resource Center (which now has offices in Helena, Montana and Washington, D.C.) was subsequently published in Spanish and distributed widely throughout the Americas.

27. See, generally, Kelly Roy and Gudmundur Alfredsson, "Indigenous Rights: The Literature Explosion", *Transnational Perspectives* 13/19 (1987).

28. G.A. Res. 45/164 (18 December 1991), proclaiming the year, and G.A. Res. 48/163 (20 December 1993), proclaiming the decade commencing 10 December 1994. See, generally, "Inauguration of the 'International Year of the World's Indigenous People'", *Transnational Law and Contemporary Problems* 3 (1993), a compilation of related statements before the General Assembly by the Secretary-General, Indigenous peoples' representatives and others.

29. International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989 (entered into force 5 September 1990) [referred to hereafter as Convention No. 169].

30. With Indigenous peoples increasingly taking charge of the international human rights agenda as it concerned them, Convention No. 107 of 1957 came to be regarded as anachronistic. In 1986, the ILO convened a meeting of experts, which recommended that the convention be revised. (Report of the Meeting of Experts, reprinted in part in International Labour

Organisation, Partial Revision of Indigenous and Tribal Populations Convention, 1957 (No. 107), Report VI(1), International Labour Conference, 75th Session (Geneva 1988), pp. 100-118) The meeting concluded unanimously that the "integrationist language" of Convention No. 107 is "outdated" and "destructive in the modern world". (p. 107, paragraph 46)

The discussion on the revision proceeded at the 1988 and 1989 sessions of the International Labour Conference, the highest decision-making body of the ILO. At the close of the 1989 session, the conference adopted the new Convention No. 169 and its shift from the prior philosophical stand. For detailed descriptions of Convention No. 169 and the process leading to it, see Lee Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989", *Oklahoma City University Law Review* (1990); and Russel Barsh, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples", *Oklahoma City University Law Review* 15 (1990). The convention came into force in 1991 with ratifications by Norway and Mexico. Subsequent ratifications include those of Bolivia, Colombia, Costa Rica, Paraguay, and Peru.

31. See Labour Canada, *Canadian Situation as regards the Indigenous and Tribal Peoples Convention (No. 169)* (1990), raising issues of federalism relevant to the convention's implementation and other concerns related to its technical congruence with Canadian law.

32. For example, article 5: "the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected".

33. PART III (Recruitment and Conditions of Employment); PART IV (Vocational Training, Handicrafts and Rural Industries); PART V (Social Security and Health); PART VI (Education and Means of Communication).

34. For example, article 7.1:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation

and evaluation of plans and programs for national and regional development which may affect them directly.

35. This is recognized, *inter alia*, in the Convention's sixth preambular paragraph, quoted earlier in the text (at note 31). The need for special state and international programs directed to Indigenous peoples has been established and widely accepted through years of expert study and official inquiry co-ordinated by international organizations. See note 42.

36. For example, article 8.1: In the application of "national laws and regulations to the peoples concerned, *due regard* shall be had to their customs or customary laws."; article 9.1: "*To the extent compatible with the national legal system and internationally recognized human rights*, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected."; article 10.1: "In imposing penalties laid down by general law on members of these peoples *account shall be taken* of their economic, social and cultural characteristics". [emphasis added]

Representatives of Indigenous peoples' organizations expressed dissatisfaction with Convention No. 169 to the 1989 International Labour Conference. See "Statement of Ms. Venne, representative of the International Work Group for Indigenous Affairs" (speaking on behalf of Indigenous peoples from North and South America, the Nordic countries, Japan, Australia and Greenland), Provisional Record 31, International Labour Conference, 76th Session (Geneva 1989), p. 31/6 [referred to hereafter as ILO Provisional Record 31].

37. The convention includes the following:

> The use of the term "peoples" in this convention shall not be construed as having any implications as regards to the rights which may attach to the term under international law. (article 1.3)

Furthermore, it was agreed that the following would appear in the record of the proceedings:

> It is understood by the Committee that the use of the term "peoples" in this Convention has no implications as regards to the right to self-determination as understood in international law. (*Report of the Committee on Convention No. 107*, Provisional Record 25, International Labour Conference, 76th Session (Geneva 1989), p. 27/7, paragraph 31 [referred to hereafter as ILO Provisional Record 25])

38. International Covenant on Civil and Political Rights, 16 December 1966, article 1, paragraph 1, 21 U.N. GAOR, Supp. No. 16, p. 52, U.N. Doc. A/6316 (1967) (entered into force 26 March 1976).

39. Statement of Lee Swepston, International Labour Organisation, to the United Nations Working Group on Indigenous Populations, 31 July 1989 (on file with the writer).

40. Swepston, cited in note 30, p. 689.

41. See notes 24-28 and accompanying text.

42. A watershed in relevant United Nations activity was the 1971 resolution of the Economic and Social Council authorizing the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to conduct a study on the "Problem of Discrimination against Indigenous Populations". (E.S.C. Res. 1589(l), U.N. ESCOR (21 May 1971)) The study, which was issued originally as a series of partial reports between 1981 and 1983, is in United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/Cn.4/Sub.2/1986/7 & Adds. 1-4 (1986), Jose Martinez Cobo, Special Rapporteur [referred to hereafter as Martinez Cobo study]. The original documents comprising the study are, in order of publication, U.N. Docs. E/CN.4/Sub.2/476/Adds. 1-6 (1981); E/CN.4/Sub.2/1982/2/Adds. 1-7 (1982); and E/CN.4/Sub.2/1983/21/Adds. 1-7 (1983).

The Martinez Cobo study initiated a pattern of further information gathering and evaluative work on the subject by experts working under the sponsorship of international organizations, for example, seminars organized by the United Nations Technical Advisory Services on racism and indigenous-state relations (Geneva 1989), indigenous self-government (Greenland 1991), and the role of Indigenous peoples in sustainable development (Chile 1992).

Upon the recommendation of the Martinez Cobo study and representatives of indigenous groups, the United Nations Human Rights Commission and the Economic and Social Council approved in 1982 the establishment of the United Nations Working Group on Indigenous Populations. (U.N. Human Rights Commission Res. 1982/19 (1982); E.S.C. Res. 1982/34, U.N. ESCOR (1982)) Through its policy of open participation in its annual one- or two-week sessions, the

Working Group has become a highly important international forum for the sustained dissemination of information and exchange of views focused on Indigenous peoples' demands. The subject of Indigenous peoples has also been taken up regularly by the Working Group's parent bodies, particularly the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Human Rights Commission. The subject also appeared on the agendas of the following recent United Nations-sponsored global conferences: the Conference on the Environment and Development (Rio de Janeiro 1992), the World Conference on Human Rights (Vienna 1993), and the International Conference on Population and Development (Cairo 1994).

Within the Organization of American States, the Inter-American Indian Institute and, to a lesser extent, the Inter-American Commission on Human Rights have maintained a continuing interest in Indigenous peoples. In November 1989, the OAS General Assembly resolved to "request the Inter-American Commission on Human Rights to prepare a juridical instrument relative to the rights of indigenous peoples." (AG/Res. 1022 (XIX-0/89))

See also note 26, discussing complaint procedures invoked by Indigenous peoples within the United Nations and OAS systems.

43. Norms of customary law arise when a preponderance of states and other authoritative actors converges upon a common understanding of the norms' content and generally expect future behaviour in conformity with the norms. McDougal, Laswell and Chen describe customary law as "generally observed to included two key elements: a 'material' element in certain past uniformities in behaviour and a 'psychological' element, or *opinio juris*, in certain subjectivities of 'oughtness' attending such uniformities in behaviour." (Meyers McDougal et al., *Human Rights and World Public Order* (1980), p. 269 [footnote omitted]) Compare article 38(1)(a) of the statute of the International Court of Justice, describing "international custom, as evidence of a general practice accepted as law." See also Louis B. Sohn, "Unratified Treaties as a Source of Customary International Law", in *Realism in Law-making: Essays on International Law in Honour of Willem Riphagan*, ed. Adrian Bos and Hugo Siblesz (1986), discussing how multilateral dialogue in the context of treaty negotiations may give rise to customary law in advance of ratification of a treaty; and

TOPCO/CALASIATIC v. *Libyan Arab Republic*, International Arbitral Tribunal, Merits (1977), *International Legal Materials* 17 (1978), René-Jean Dupuy, arbitrator, finding applicable customary law in part on the basis of patterns of voting on United Nations General Assembly resolutions.

The theoretical grounding for identifying new customary international law concerning Indigenous peoples is described more fully in S. James Anaya, "Indigenous Rights Norms in Contemporary International Law", *Arizona Journal of International and Comparative Law* 8/2 (1991), pp. 8-15 and notes 37-59.

44. See ILO Provisional Record 25, cited in note 37, pp. 24-25.

45. International Labour Organisation, Provisional Record 32, International Labour Conference, 76th Session (Geneva 1989), pp. 32/17-19 [referred to hereafter as ILO Provisional Record 32].

46. Among the delegates recording votes in favour of the convention were representatives of the governments of 92 states; the government delegations of 20 states recorded abstentions.

47. Peru's statement is typical of the views expressed by the abstaining governments:

> Given the importance of this subject for Peru, our delegation participated actively in the revision of Convention No. 107 with a view to updating the text and improving it on a multilateral basis to promote the rights of indigenous and native populations and to guarantee these rights in the various countries. We also wished to ensure that, within the international community these populations would be able to develop fully and transmit their cultural heritage.
>
> In my country, there is very progressive legislation along these lines and I must highlight the fact that most of the criteria laid down in the new Convention are already contained in our legal instruments. However, the work which has taken place within this tripartite forum — at an international level — has been of considerable significance and receives our full support.
>
> In this context, after the prolonged negotiations which led to a consensus text, our delation nevertheless felt bound to express reservations with respect to the use in the Convention of some terms which could lead to

ambiguous interpretations and create difficulties with our laws in force, on some points of the highest importance. These reservations are laid down in paragraph 156 of the report of the Committee... (ILO Provisional Record 32, cited in note 45, p. 32/12)

The part of the Committee report referred to reflects Peru's concern about the use of the term 'territories' and other language that "might imply the right to accord or deny approval and thereby lead to concepts of sovereignty outside the Constitution." (ILO Provisional Record 25, cited in note 37, p. 25/22) See also, for example, statement of the government delegate of Argentina, ILO Provisional Record 32, cited in note 45, p. 32/12, concurring in the "pluralistic view of the new Convention" and endorsing "national legislation which recognises the cultural and social identity of indigenous peoples and the granting of land to [them]", while at the same time expressing difficulty with use of the term 'peoples' to refer to the subject groups and with the inclusion of the words 'consent' and 'agreement' in article 6, paragraph 2.

48. A sampling of such comments appears verbatim or in summary form in *Analytical Compilation of Observations and Comments received pursuant to Sub-Commission Resolution 1988/18*, U.N. Doc. E/CN.4/Sub.2/1989/33/Adds.1-3 (1989); *Analytical Commentary on the Draft Principles Contained in the First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1 & Adds.1-3 (1990); and *Revised Working Paper Submitted by the Chairperson/Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1991/36 (1991).

49. *Draft Declaration on the Rights of Indigenous Peoples as Agreed Upon by the Members of the Working Group at its Eleventh Session*, U.N. Doc. E/CN.4/Sub.2/1993/29, Annex I (1993) [cited hereafter as Draft Declaration].

The United Nations Working Group on Indigenous Populations was established in 1982 as a organ of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, with a mandate to review developments concerning Indigenous peoples worldwide and to work toward the development of corresponding international standards. (U.N. Human Rights Commission Resolution 1982/19, cited in note 42)

50. On self-determination, see Draft Declaration, cited in note 49, article 3: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

On land and resource rights, see, for example, article 26:

> Indigenous peoples have the right to own, develop, control, and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

On rights of political autonomy, see, for example, article 31:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

51. Cited in note 42. The proposal for a new OAS legal instrument on indigenous rights is described in *Annual Report of the Inter-American Commission on Human Rights, 1988-89*, pp. 24-251, O.A.S. Doc. OEA/Ser.L/V/II.76, Doc. 10 (18 September 1989).

52. This commentary is summarized in *Report on the First Round of Consultations Concerning the Future Inter-American Legal Instrument on Indigenous Rights*, published in *Annual Report of the Inter-American Commission on Human Rights, 1992-1993*, O.A.S. Doc. OEA/Ser.L/V/II.83 Doc. 14, corr. 1 (1993), p. 263.

53. See Julian Burger, *Report From the Frontier: The State of the World's Indigenous Peoples* (1987), pp. 1-5, discussing the impact of development projects on indigenous lands, especially in parts of the developing world.

54. See, generally, Shelton Davis and William Partridge, "Promoting the Development of Indigenous People in Latin America", *Finance and Development* (March 1994), pp. 38-39, discussing the role of the World Bank and other international donors.

55. A discussion of the dynamics leading to the adoption of World Bank Operational Directive 4.20 is in Michael Cernea, *Sociologists in a Development Agency: Experiences from the World Bank* (Washington, D.C.: World Bank Environment Department, May 1993).

56. Agenda 21, United Nations Conference on Environment and Development, 13 June 1992, U.N. Doc. A/CONF.151/26/Rev. 1, vol. I, Annex 2 (1993).

57. Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Eur. Parl. Doc. (PV 58) 2 (9 February 1994).

58. Resolution of the Inter-American Commission on Human Rights, 14 March 1973, OEA/Ser.P.AG/doc. 305/73 rev. 1, pp. 90-91 (1973); Helsinki Document 1992 -The Challenges of Change, para. 6(29), reprinted in U.N. GAOR, 47th Sess., U.N. Doc. A/47/361 (1992), p. 65; and United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (12 July 1993).

59. Such reporting has occurred on a regular and sustained basis in the annual meetings of the United Nations Working Group on Indigenous Population pursuant to the Group's mandate "to review developments pertaining to the promotion and protection of indigenous populations." (Sub-Commission Resolution 1985/22 (29 August)) See summaries of "Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations", which appear in the annual reports of the Working Group. Written government submissions on domestic developments appear in U.N. Doc. E/CN.4/Sub.2/AC.4/1989/2&Add.1 (information received from Australia, Brazil, Canada and Venezuela); U.N. Doc. E/CN.4/Sub.2/AC.4/1990/4 (information received from Bangladesh); and U.N. Doc. E/CN.4/Sub.2/AC.4/1991/4 (information received from Colombia).

60. Declaración de Colombia en Nombre del Grupo Latinoamericano y del Caribe en la Conmemoración del Año Internacional de las Poblaciones Indígenas (Tema 8), Conferencia Mundial de Derechos Humanos (18 June 1993) [translated from the Spanish by the writer].

61. H.E. Ambassador Haakon B. Hjelde, Head of the Norwegian Delegation, Statement on Behalf of the Delegations of Finland, Sweden and Norway to the World Conference on Human Rights, Vienna (18 June 1993).

62. Z.A. Kornilova, Statement by Member of the Delegation of the Russian Federation at the World Conference on Human Rights on Agenda Item 8, "International Year of the World's Indigenous People" (18 June 1993).

63. A discussion of the content and general contours of new and emergent international norms concerning Indigenous peoples is in S. James Anaya, "Indigenous Rights Norms", cited in note 43.

64. Charter of the United Nations, article 1, paragraphs 2, 3, 55, 56.

65. See *Filartiga* v. *Peña-Irala*, 630 F.2d 876 (2d. Cir. 1980), U.S. court of appeals decision holding that the United Nations Charter obligation to uphold human rights applies to those human rights whose content is generally understood.

66. International Covenant on Civil and Political Rights, cited in note 38; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1967), p. 49 (entered into force 3 January 1976); International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, G.A. Res. 2106 A(XX), 20 U.N. GAOR, Supp. No. 14, U.N. Doc. A/6014 (1965), p. 47 (entered into force 4 January 1969).

67. This is evident in the widely circulated report commissioned by a committee of the Quebec National Assembly: Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, and Christian Tomuschat, *The Territorial Integrity of Quebec in the Event of Accession to Sovereignty* (8 May 1992) [referred to hereafter as the Pellet Report]. The distinguished authors of the report observe that "the right to self-determination is of 'variable geometry' in the sense that, while it means that all peoples

everywhere and always have the right to participate in the political, economic, social or cultural choices concerning them, it very rarely results in a right to independence." (p. 40) The authors emphasize that the right of self-determination, thus understood, "is not limited to any particular category of peoples", and they criticize Canada's ambiguous resistance to considering Aboriginal peoples as 'peoples' in international public discourse. (p. 41 and note 114)

68. See, for example, *Report of the Human Rights Committee*, U.N. GAOR, 47th Sess., Supp. 40, U.N. Doc. A/47/40 (1992), noting that "the right of self-determination applied not only to colonial situations but to other situations as well and that the people of a given territory should be allowed to determine their political and economic destiny" and requesting of Iraq "clarification of the position on the autonomy of Iraqi Kurdistan" (p. 52); *Report of the Human Rights Committee*, U.N. GAOR, 46th Sess., Supp., U.N. Doc. A/46/40 (1991), discussing "self-determination in its domestic dimensions" in Panama, particularly in regard to elections and parliamentary rule (p. 105) and discussing "ethnic and community structure" and electoral reform in Madagascar (p. 131); and *Report of the Human Rights Committee, Vol. I*, U.N. GAOR, 45th Sess., Supp. 40, U.N. Doc. A/45/40 (1990), discussing policy of Zaire toward apartheid regime in South Africa (p. 122). See also Human Rights Committee, *General Comment on 12(21): Comment on article 1*, reprinted in United Nations, *Manual on Human Rights Reporting*, U.N. Doc. HR/PUB/91/1, Sales No. E.91.XIV (1991), commenting on the breadth of coverage of article 1, including its applicability with regard to a state's own population (pp. 82-82).

69. *Report of the Human Rights Committee* (1992), cited in note 68, p. 101.

70. *Third Periodic Reports of States Parties Due in 1990: Colombia*, U.N. Doc. CCPR/C/64/Add.3 (1991), p. 9.

71. United States Department of State, *Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights* (Department of State Publication 10200, 1994), pp. 36-46.

72. *Report of the Human Rights Committee* (1991), cited in note 68, pp. 22-25. Other relevant examples of the Committee's discussion of country reports in connection with article 27 are *Report of the Human Rights Committee* (1990), cited in note 68, p. 95, considering elections and other developments in Nicaragua as they concerned the Indigenous people of the Atlantic Coast region of that country; *Report of the Human Rights Committee*, U.N. GAOR, 48th Sess., Supp. No. 40, U.N. Doc. A/48/40 (Part I) (1993), pp. 66-67, questioning aspects of Venezuela's constitution and laws with regard to indigenous group cultural survival and land rights; *Report of the Human Rights Committee* (1992), cited in note 68, discussing social organization and land rights issues concerning the Indigenous peoples of the Ecuadoran Amazon (pp. 58-67) and political participation, land rights and autonomous organization of indigenous communities in Peru (pp. 84-85). See also *General Comment of the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 23(50)* (art. 27), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), discussing the breadth of coverage of article 27 and its relation with other articles of the covenant.

73. *Ominayak, Chief of the Lubicon Lake Band* v. *Canada*, Communication No. 267/1984, *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. II, U.N. Doc. A/45/40, Annex IX (A) (1990), p. 1 (views adopted 26 March 1990). The case is discussed and analyzed in Dominic McGoldrick, "Canadian Indians, Cultural Rights and the Human Rights Committee", *International and Comparative Law* 40 (1991), p. 658.

74. *Report of the Human Rights Committee* (1990), cited in note 73, paragraph 32.1.

75. The Committee similarly avoided article 1 and reached the merits of a claim via another provision of the CCPR in a case involving the Mi'kmaq. The Mi'kmaq Tribal Society had claimed that its right to self-determination under article 1 of the covenant was violated by Canada's refusal to allow a representative of the Society to participate directly in discussions about reform of Canada's constitution. While declining to consider the claim under article 1 on jurisdictional grounds identical to those invoked in *Ominayak*, the Committee held the Mi'kmaq claim admissible under article 25(a), which provides

that every citizen has the right "[t]o take part in the conduct of public affairs, directly or through freely chosen representatives." On the merits, the Committee found that, "in the specific circumstances of the present case", article 25(a) was not violated. (*Mikmaq People* v. *Canada*, Communication No. 205/1986, *Report of the Human Rights Committee*, U.N. GAOR, 47th Sess., Supp. No. 40, U.N. Doc. A/47/40, Annex IX(A) (1992) (views adopted 4 November 1991), p. 213) The Committee observed that, although the Mi'kmaq Tribal Society itself was not allowed direct participation in the constitutional reform process, a number of national Aboriginal peoples' associations were invited to participate in various phases of the process. The Committee did not suggest that the scheme for Aboriginal participation in the constitutional talks was optimal, given the legitimate particularized interests of the Mi'kmaq and other discrete Aboriginal groups. But, in the Committee's view, the circumstances did not rise to a violation of article 25(a), a view reached independently of any protections that might otherwise be accorded 'peoples' under article 1. The Committee did not address the relevance of article 27 of the CCPR.

76. This point is made and elaborated upon in Douglas Sanders, "Collective Rights", *Human Rights Quarterly* 13 (1991), p. 368.

77. See *Lovelace* v. *Canada*, Communication No. R 6/24, *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40, Annex XVIII (1981), pp. 166, 173 (views adopted 29 December 1977), quoting article 27.

78. *Kitok* v. *Sweden*, Communication No. 197/1985, *Report of the Human Rights Committee*, U.N. GAOR, 43rd Sess., Supp. No. 40, U.N. Doc. A/43/40, Annex VII (G) (1988), p. 207 (views adopted 27 July 1988).

79. See, for example, *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 48th Sess., Supp. No. 18, U.N. Doc. A/48/18 (1993), pp. 40-43, evaluating government programs in Ecuador concerning indigenous languages, lands, benefits from natural resource exploitation, and participation in government decision making [cited hereafter as CERD Report]; *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 47th Sess., Supp. No. 18, U.N. Doc. A/47/18 (1992), pp. 38-44, 47-52, 59-62, discussing a broad range of issues concerning Indigenous peoples in connection with reports by, respectively, Costa Rica, Bangladesh,

Colombia and Chile); and *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 46th Sess., Supp. No. 18, U.N. Doc. A/46/18 (1991), pp. 28-32, 50-56, 62-69, 90-94, similar discussion in connection with reports by, respectively, Argentina, Canada, Sweden, Australia and Mexico.

80. See, for example, *CERD Report* (1993), cited in note 79, pp. 40-41, criticizing Ecuadoran report on natural resource development programs on grounds that "such programs did not appear to be of direct benefit to the [Indigenous] populations whose lands were being used and no mention of their views had been included in the report"; p. 42, asking Ecuadoran government to state what demands had been made by Indigenous populations in 1990 particularly with regard to land; and *CERD Report* (1991), cited in note 79, pp. 62-65, expressing surprise that the Swedish government had not included more information about the indigenous Sami in its report.

PART II

81. See the paper by James Anaya earlier in this volume (page 9) for detailed analysis in support of this assertion.

82. International Covenant on Economic, Social and Cultural Rights, cited in note 66, ratified by Canada on 19 May 1976; International Covenant on Civil and Political Rights, cited in note 38, ratified by Canada on 19 May 1976.

83. See Brian Slattery, "The Paradoxes of National Self-Determination: Canada, Quebec, and Indigenous Peoples", *Osgoode Hall Law Journal* (1995) [forthcoming].

84. Lenin's Fourth Letter from Afar (25 March 1917), quoted in Antonio Cassese, *International Law in a Divided World* (Oxford University Press, 1986), p. 131.

85. Helpful discussion in Cassese, cited in note 84, pp. 132-134.

86. This language is repeated in article 55 in the setting of human rights.

87. G.A. Res. 1514, cited in note 18. The vote was 89-0, with nine significant abstentions: Portugal, Spain, South Africa, the United Kingdom, the United States, Australia, Belgium, the Dominican Republic and France. Canada voted with the majority.

88. See also G.A. Res. 1541, cited in note 18, for amplification.

89. This thinking is made manifest and is expressed more fully authoritatively two years later in the General Assembly Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803(XVII) (1962).

90. G.A. Res. 2625(XXV).

91. Rosalyn Higgins, *Problems and Progress: International Law and How We Use It* (Oxford University Press, 1994), pp. 122-23; see also Higgins' discussion on the determination of the boundaries of Guinea-Bissau.

92. Higgins, cited in note 91, p. 123.

93. Cassese, cited in note 84, p. 134.

94. *I.C.J. Rep.*, 1975.

95. Some of these issues are discussed in later sections on the breakup of Yugoslavia and the Soviet Union, and the relevance of diplomatic recognition and admission to the United Nations is a major theme of Donat Pharand's paper later in this volume.

96. Higgins, cited in note 91, p. 128.

97. For an influential critique see Howard Berman, "The International Labour Organisation and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference", *The Review* 41 (1988), pp. 49-57.

98. See Frederick L. Kirgis, "The Degrees of Self-Determination in the United Nations Era", *American Journal of International Law* 88 (1994), p. 304.

99. This is presumed in a widely influential book summarizing recent practice, Morton H. Halperin and David J. Scheffer, *Self-Determination in the New World Order* (Washington, D.C.: Carnegie Endowment for International Peace, 1992).

100. Erica-Irene Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination", *Transnational Law and Contemporary Problems* 3 (1993), p. 9.

101. Daes, cited in note 100, p. 10. It is worth noting that Dalee Sambo takes a similar approach, asserting that "indigenous peoples and states, together, can work to bring to an end" such evils as "colonization, human rights violations, and deplorable conditions that are a fact of life for most indigenous peoples around the world." Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?", *Transnational Law and Contemporary Problems* 3 (1993), p. 47.

102. Daes, cited in note 100; see also conclusion, p. 11, where the position is taken that without such an extension of democracy, Indigenous peoples could find themselves "compelled to rebellion as a last resort against oppression."

103. For more detail on the Commission, see note by Marizio Ragazzi introducing the texts of the opinions rendered so far, in *International Legal Materials* 31 (1992), pp. 1488-1491.

104. Hurst Hannum, "Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?", *Transnational Law and Contemporary Problems* 3 (1993), pp. 59-69.

105. Frontier Dispute (*Burkina Faso* v. *Mali*), *I.C.J. Rep.*, 1986 (22 December), p. 565.

106. See Hannum, cited in note 104, pp. 66-67, for criticism; also Benedict Kingsbury, "Claims by Non-State Groups in International Law", *Cornell International Law Journal* 25 (1992), p. 481.

107. The Pellet Report, cited in note 67. The study was commissioned by the committee designated by the National Assembly to examine issues of territorial integrity, but not officially presented to it.

108. Pellet Report, p. 2.

109. The Pellet Report (p. 7) confirms such an interpretation in stating that the questions put to it "are situated 'downstream' from accession to independence. That event is postulated, and it is a matter of determining the effect of international law after it has occurred."

110. Pellet Report, p. 5.

111. Pellet Report, p. 24.

112. Pellet Report, p. 28.

113. Pellet Report, p. 35.

114. Pellet Report, pp. 40-42.

115. Pellet Report, p. 41.

116. Thomas M. Franck, "The Emerging Right of Democratic Governance", *American Journal of International Law* 86/1 (1992).

117. Pellet Report, cited in note 67, p. 55.

PART III

118. Reproduced in Whiteman, *Digest of International Law*, volume 2 (1963), p. 15.

119. *Deutsche Kontinental Gas-Gessellschat Case*, 1929, reported in *Recueil des décisions des Tribunaux Arbitraux Mixtes*, volume IX (1936), p. 336; cited in C. Rousseau, *Traité de Droit international public* (1953), p. 299 [translated from the French by the writer].

120. Reproduced in Whiteman, cited in note 118, p. 8.

121. Whiteman, p. 16.

122. Whiteman, p. 17.

123. Reproduced in *International Legal Materials* [*I.L.M.*] 31 (1992), p. 1487.

124. *I.L.M.* 31, p. 1489.

125. *I.L.M.* 31, p. 1495 [emphasis added].

126. *I.L.M.* 31, p. 1526. For a criticism of the Commission's approach, extending the application of the doctrine of *uti possidetis* beyond a decolonization situation, see Richard Falk's paper earlier in this volume (page 41).

127. *I.L.M.* 31, p. 1526.

128. *I.L.M.* 29 (1990), pp. 1318-1320.

129. This position finds support in emerging customary international law, as explained by Richard Falk in his discussion of the claim of Aboriginal peoples to a distinct right of self-determination (earlier in this volume). On the new and emergent customary international law generally relating to certain minimum standards governing the behaviour of states toward Indigenous peoples, see James Anaya's paper, also in this volume.

130. [Committee to consider issues related to Quebec's accession to sovereignty]. See its *Projet de Rapport* [draft report] (1992), pp. 33-34.

131. See "Ceremony to alter Canada's course", *The Globe and Mail* (7 December 1994), p. A5.

PART IV

132. It is now called the department of international affairs, immigration and cultural communities.

133. Ivan Bernier, "ASIL/CCIL Joint Panel on the Conduct of International Relations in Federal States", *Proceedings of the American Society of International Law* (1991), pp. 133-134.

134. Parti québécois, *Le Québec dans un Monde Nouveau* (1993), pp. 76-78.

135. The government of Quebec adopted decrees declaring itself favourable to the two free trade agreements: the FTA by Decree 944-88, 15 June 1988, and NAFTA by Decree 985-94, 6 July 1994.

136. Section 8 of the draft bill on the sovereignty of Quebec.

137. *I.C.J. Rep.*, 1947-1948, p. 62.

138. *I.C.J. Rep.*, 1950, pp. 7-8.

139. Charter of the United Nations, articles 55 and 56.

140. North American Free Trade Agreement (1992), article 2204, paragraph 1 [cited hereafter as NAFTA].

141. NAFTA, article 2204, paragraph 2.

142. See "NAFTA gets fourth amigo", *The Globe and Mail* (12 December 1994), p. A1.

143. Vienna Convention on the Law of Treaties (1969), article 15, paragraph (c).

144. NAFTA, Annex II—Canada, II-C-1 [emphasis added].

145. NAFTA, Annex II, II-M-9 and II-U-6.

146. Copenhagen document cited in note 128; Charter of Paris reproduced in *I.L.M.* 30 (1991).

147. Declaration and Decisions from Helsinki Summit, *I.L.M.* 31 (1992), p. 1395.

148. Article 10, *Canadian Treaty Series*, No. 7; and Whiteman, *Digest of International Law*, volume 12 (1971), p. 859.

149. See Donat Pharand, "Canada and the OAS: The Vacant Chair Revisited", *Revue générale de droit* 17, p. 432.

150. Charter of Bogota, article 8, as amended.

151. Charter of Bogota, article 6.

152. See Pharand, cited in note 149, pp. 449-453.

153. See Canada, *Human Rights in Canada*, Report of Canada to the Inter-American Commission on Human Rights (February 1992).

ANNEX I

154. Conference on Yugoslavia (Arbitration Committee), "Opinion No. 1", reprinted in *I.L.M.* 31 (1992), p. 1495.

155. Vienna Convention on Succession of States in Respect of Treaties, article 5, reprinted in *I.L.M.* 17 (1978), p. 1492 [emphasis added].

156. See Vienna Convention on the Law of Treaties, cited in note 143, article 53.

157. Arbitration Committee, cited in note 154, p. 1496. In addition to this body of law, it is relevant to underline that there is now

greater sensitivity to the mutuality of relationship that exists between a state and the Indigenous peoples under its jurisdiction.

158. International Law Commission [I.L.C.], *Yearbook*, volume II (1974), p. 9.

159. The United States closed the base and handed the territory over to Canada on 27 September 1994.

160. Lord McNair, *The Law of Treaties* (1961), p. 601 [emphasis added].

161. McNair, cited in note 160, p. 601, note 11 [emphasis added].

162. I.L.C., *Yearbook*, volume II (1972), pp. 42-43 [emphasis added].

163. I.L.C., *Yearbook*, volume II (1974), p. 72 [emphasis added].

164. Vienna Convention, cited in note 155, article 34, paragraph 1 [emphasis added].

165. Article 34, paragraph 2. Article 34 applies whether or not the predecessor state continues to exist. The other provision on secession (article 35) applies only when the predecessor state continues to exist and relates to treaties that will continue to apply to the territory of the predecessor state. It does not concern the successor state at all.

166. Maurice Arbour, *Droit international public* (1985), p. 319 [translated by the writer].

167. Statute of the International Court of Justice, cited in note 43.

168. *I.C.J. Rep.*, 1969, p. 45, paragraph 77 [emphasis added].

169. See *Recueil des Ententes Internationales du Québec 1984-1989* (1990), pp. 809, 833.

170. For a discussion of ILO Convention No. 169, see James Anaya's paper earlier in this volume.

171. See Arbitration Committee, cited in note 154, p. 1487.

172. For a similar view, see Rein Mullerson, "The Continuity and Succession of States, by Reference to the Former USSR and

Yugoslavia", *International and Comparative Law Quarterly* 42 (1993), p. 490.

173. See *German Settlers Case*, P.C.I.J., [1923] Series B, No. 6, p. 36.

174. Louis Henkin, "General Course on Public International Law", *Recueil des Cours*, volume IV (1989), p. 234.

175. In support of this opinion, see James Anaya's paper earlier in this volume.

176. For a discussion of these rights substantiating this statement, see James Anaya's paper earlier in this volume.

ANNEX II

177. Statute of the International Court of Justice, article 38, paragraph 1(c). It must be remembered that the statute of the Court was first drafted in 1920, and this provision, on the applicable sources of law, was retained without change at the time of re-drafting in 1945.

178. See, for instance, the following cases: *Chorzow Factory*, [1928] P.C.I.J. Ser. A, No. 17, p. 29; *Temple of Preah Vihear*, [1962] *I.C.J. Rep.* 6, p. 26; *Effects of Awards of UN Administrative Tribunal*, [1954] *I.C.J. Rep.* 47, p. 53.

179. *I.C.J. Rep.*, 1984, pp. 303-312, paragraphs 126-154, and p. 305, paragraph 130.

180. *I.C.J. Rep.*, 1950, p. 128 [emphasis added].

181. Henry Reynolds, "Aboriginal Governance in Australia", draft research study prepared for the Royal Commission on Aboriginal Peoples (1993).

182. Bradford Morse, "Comparative Assessments of Indigenous Peoples in Quebec, Canada and Abroad", Record of proceedings of the Commission d'études sur toute offre d'un nouveau partenariat de nature constitutionnelle, No. 20 (26 March 1992), p. 331.

183. Morse, cited in note 182, p. 332.

184. Treaty of Waitangi, article 1, reproduced in Tipene O'Regan, "Indigenous Governance", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994).

185. O'Regan, cited in note 184, pp. 26, 29.

186. O'Regan, p. 27 [emphasis added].

187. O'Regan, p. 27 [emphasis added].

188. Morse, cited in note 182, p. 324.

189. Morse, p. 316.

190. Morse, p. 317.

191. This section was prepared by James Anaya.

192. See, for example, *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10 (1944), special jurisdictional act allowing tribe to sue for mismanagement of resources under same standards applicable to private trustee; *Seminole Nation* v. *United States*, 316 U.S. 286 (1942), action against government for failure to meet fiduciary standards in disbursing treaty annuity payments; *United States* v. *Mitchell*, 463 U.S. 206 (1983), action for money damages for breach of fiduciary obligations arising from statutory scheme. See generally Reid Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians", *Stanford Law Review* 27 (1975), pp. 1213-48. See also *Lincoln* v. *Vigil*, 113 S.Ct. 2024, 124 L.Ed. 2d 101 (1993), holding that the trust relationship did not limit the discretion of the Indian Health Service to eliminate its Indian Children's Program in the southwestern United States in favour of a nation-wide program.

193. See, for example, *United States* v. *Mitchell*, cited in note 192, finding a breach of fiduciary duty by the United States for mismanagement of timber resources; the court found that this duty arises not from express statutory language, but "necessarily arises" when the government exercises substantial control over Indian property.

194. See, for example, *McNabb* v. *Bowen*, 829 F.2d 787 (9th Cir. 1987), holding that the Indian Health Service's refusal to pay for medical care of an Indian child because the state had primary responsibility was "inconsistent with the trust doctrine" and that

Congress's intent under the *Indian Health Care Improvement Act* was "brought into sharper focus by the trust doctrine".

195. Message from the President of the United States transmitting recommendations for Indian Policy, H.R. Doc. No. 363, 91st Congress, 2nd Session (1970).

196. *Indian Self-Determination and Education Assistance Act of 1975*, 25 U.S.C.A. 450a-450n.

197. 25 U.S.C.A. 450f (as amended).

198. 25 U.S.C. 1451 et seq. (1974).

199. *Indian Tribal Government Tax Status Act of 1982*, 96 Stat. 2607.

200. Getches et al., *Federal Indian Law*, cited in note 26, pp. 257-258.

201. 25 U.S.C.A. 1901-1963. For a summary of the act, see Getches et al., cited in note 26, pp. 605-624. The act places jurisdiction over most Indian child custody proceedings in the Indian tribe and, among other provisions, requires that preference be given to other members of the child's tribe for adoptive placement of the child.

202. The former practices had resulted, in the period 1969-1974, in approximately 25 to 35 per cent of Indian children being separated from their families. Manuel P. Guerroro, "The Indian Child Welfare Act of 1978", *American Indian Law Review* 7 (1979), excerpts reprinted in Getches et al., cited in note 26, pp. 606-607.

203. 26 U.S.C. 1902.

204. 25 U.S.C. 1901 (3) [emphasis added].

205. *Indian Health Care Improvement Act*, 25 U.S.C. 1901.

206. *American Indian Religious Freedom Act of 1978*, 42 U.S.C. 1996.

207. See *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 455 (1988).

208. President Ronald Reagan, Statement on Indian Policy, *Weekly Compilation of Presidential Documents* 19 (24 January 1983), p. 98.

209. *Native American Graves Protection and Repatriation Act*, 25 U.S.C. 3001 et seq. Section 3010 states, "This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization, or foreign government."

210. Karen Ball, *New York Daily News*, 30 April 1994.

211. Louis Sahagun, "Tribal Leaders Meet, Voice Sovereignty Concerns", *Los Angeles Times*, 6 May 1994.

212. Senate Concurrent Resolution 44, 103rd Congress, 1st Session (1993).

213. United States Department of State, *1993 Human Rights Practices*. See also Conference Report on H.R. 2295, recommendation of the conference committee on H.R. 2295 (a bill making appropriations for foreign operations and related programs) that the treatment of Indigenous peoples be assessed in the State Department's annual human rights reports.

214. *Greenland Home Rule Act*, No. 577, 29 November 1978, sections 1 and 6.

215. See Morse, cited in note 182, pp. 319-320.

216. Morse, p. 337.

217. This and the following observations are contained in Morse, pp. 340-343.

ANNEX III

218. ILO Convention No. 169, cited in note 29.

219. Article 19, paragraph 7.

220. See letter from Justice to Labour, 9 February 1990, as required by order in council P.C. 3252, 5 July 1950.

221. Labour Canada, *Canadian Situation*, cited in note 31, pp. 1-2.

222. *Canadian Situation*, pp. 15, 13.

223. *Canadian Situation*, cited in note 31, p. 13.

224. Article 34 [emphasis added].

225. See Vienna Convention, cited in note 143, article 26.

226. Article 8, paragraph 1.

227. Article 9, paragraph 1.

228. Article 9, paragraph 2.

229. Article 10, paragraph 2.

230. *Canadian Situation*, cited in note 31, p. 14 [emphasis added].

231. *Canadian Situation*, p. 14.

232. Article 27, paragraph 3.

233. *Canadian Situation*, p. 14.

234. *Canadian Situation*, p. 14.

235. For instance, the Inuvialuit Final Agreement of 1984 represents a settlement of land claims based on traditional use and occupancy in the Western Arctic, a settlement that covers considerable sea ice areas. The settlement region even includes part of the Beaufort Sea, where the Inuit are granted the exclusive right to harvest certain species of wildlife such as the polar bear and a preferential right to harvest other species. For a discussion of the 1984 agreement, see Janet M. Keeping, *The Inuvialuit Final Agreement* (Calgary: Canadian Institute of Resources Law, University of Calgary, Alberta, October 1989).

236. See *The High Arctic Relocation, A Report on the 1953-55 Relocation* (Ottawa: Minister of Supply and Services, 1994), pp. 163-164.

237. ILO, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report VI (2A) (Geneva: 1989), p. 9; quoted in Grand Council of the Crees (of Quebec), *Status and Rights of the James Bay Crees in the Context of Quebec's*

Secession from Canada, Submission to the United Nations Commission on Human Rights (February 1992), p. 60.

238. Douglas Sanders, "Developing a Modern International Law on the Rights of Indigenous Peoples", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994), p. 59.

239. For a fuller discussion of the declaration, see James Anaya's paper earlier in this volume. For a comprehensive treatment of the right of self-determination of Indigenous peoples, see Richard Falk's paper, also in this volume.

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